UNITED STATES REPORTS

VOLUME 457

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1981

JUNE 7 THROUGH JUNE 25, 1982

HENRY C. LIND

REPORTER OF DECISIONS

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ERRATUM

424 U. S. 956, No. 75–5908: In lieu of "169 U. S. App. D. C. 129, 515 F. 2d 360" substitute "174 U. S. App. D. C. 351, 533 F. 2d 578".

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4-12-85

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

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REX E. LEE, SOLICITOR GENERAL.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1981

RODRIGUEZ ET AL. *v.* POPULAR DEMOCRATIC PARTY ET AL.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO

No. 81–328. Argued March 22, 1982—Decided June 7, 1982

A member of appellee Popular Democratic Party (hereafter appellee) who was elected in a 1980 general election to the Puerto Rico House of Representatives from District 31, died in 1981. The Governor of Puerto Rico subsequently called for a "by-election"—open to all qualified voters in District 31—to fill the vacancy. Appellee then filed suit in the Superior Court of Puerto Rico, alleging that the Puerto Rico statutes under which the Governor purported to act authorized only candidates and electors affiliated with appellee to participate in the by-election. Appellants, qualified electors in District 31 who are not affiliated with appellee, intervened as defendants. The court entered judgment for appellee. The Puerto Rico Supreme Court modified the Superior Court's judgment, holding, *inter alia*, that the pertinent statute, as properly construed, requires a by-election only if the party of the legislator vacating the seat fails to designate a replacement within 60 days after the vacancy occurs, and that if the party selects a single candidate within such period, that candidate is declared "automatically elected to fill the vacancy." The court rejected appellants' contention that this procedure violated the Federal Constitution. While the case was pending before the Puerto Rico Supreme Court, appellee held a primary election in which only its members were permitted to participate and which resulted in the selection of a person who, pursuant to the Supreme Court's mandate, was sworn in as the new representative from District 31.

Held: The Puerto Rico statute, as interpreted by the Puerto Rico Supreme Court to vest in a political party the initial authority to appoint an

interim replacement for one of its members who vacates a position as a district senator or representative, does not violate the Federal Constitution. Pp. 5–14.

(a) The voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other United States citizens. At the same time, Puerto Rico, like a state, is an autonomous political entity, "sovereign over matters not ruled by the Constitution," *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 673, and the methods by which its people and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference. Pp. 7–8.

(b) The right to vote, *per se*, is not a constitutionally protected right, and the Constitution does not compel a fixed method of choosing state or local officers or representatives. While a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction when a state or the Commonwealth of Puerto Rico has provided that its representatives be elected, the Puerto Rico statute at issue does not restrict access to the electoral process or afford unequal treatment to different classes of voters, candidates, or political parties. All qualified voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise. Cf. *Valenti* v. *Rockefeller*, 393 U. S. 405. Moreover, the interim appointment system serves the legitimate purpose of ensuring that vacancies are filled promptly, without the necessity of the expense and inconvenience of a special election. Pp. 8–12.

(c) Nor is Puerto Rico's appointment mechanism rendered constitutionally defective by virtue of the fact that the interim appointment power is given to the political party with which the previous incumbent was affiliated. The Puerto Rico Legislature could reasonably conclude that appointment by the previous incumbent's political party would more fairly reflect the will of the voters than appointment by the Governor or some other elected official, particularly where such official is a member of a different party. And in light of Puerto Rico's special interest in ensuring minority representation in its legislature, it was not unreasonable for the legislature, in establishing the appointment system for filling vacancies, to make provision for continuity of party representation. Pp. 12–13.

(d) Appellants' rights of association and equal protection of the laws were not violated by their exclusion, because of their party affiliation, from appellee's special election held to select the interim representative. Puerto Rico law authorized appellee to designate the interim replacement, and it was entitled to adopt its own procedures for such selection.

Appellee was not required to include participation by nonmembers. P. 14.

—— P. R. R. ——, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Phillip A. Lacovara argued the cause for appellants. With him on the briefs were *Gerald Goldman* and *William R. Stein.*

Abe Fortas argued the cause for appellees. With him on the briefs was *Rafael Hernandez-Colon.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this appeal is whether Puerto Rico may by statute vest in a political party the power to fill an interim vacancy in the Puerto Rico Legislature. The Supreme Court of Puerto Rico held that such a procedure did not violate the United States Constitution. We noted probable jurisdiction, 454 U. S. 938 (1981), and we affirm.

I

In the November 4, 1980, Puerto Rico general election, Ramon Muniz, a member of appellee Popular Democratic Party, was elected to the Puerto Rico House of Representatives from District 31.[1] Muniz died on January 28, 1981. The Governor of Puerto Rico, a member of the opposition New Progressive Party, subsequently called for a "by-election"—open to all qualified voters in District 31—to fill the vacancy caused by Muniz' death. The Governor purported to act pursuant to Articles 5.006 and 5.007 of the Electoral Law of Puerto Rico, P. R. Laws Ann., Tit. 16, §§ 3206, 3207 (Supp. 1980).[2]

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[1] The Puerto Rico Legislative Assembly consists of two chambers—the House of Representatives, with 51 members, and the Senate, with 27 members. P. R. Const., Art. III, §§ 1 and 2. A single general election is held in Puerto Rico every four years for all elective officials. Art. VI, § 4; P. R. Laws Ann., Tit. 16, §§ 3201, 3205 (Supp. 1980).

[2] Article 5.006 provides, in pertinent part:

"When a vacancy occurs in the office of a senator or representative

On March 3, 1981, the Popular Democratic Party instituted this action in the Superior Court of Puerto Rico, alleging that Articles 5.006 and 5.007 authorized only candidates and electors affiliated with the Party to participate in the by-election. Appellants, 10 qualified electors in District 31 who are not affiliated with the Popular Democratic Party, intervened as defendants. On March 20, 1981, the Superior Court entered judgment for the Popular Democratic Party; it ordered the Governor and General Administrator of Elections to limit participation in the by-election to Party members. App. to Juris. Statement 36a.

A divided Supreme Court of Puerto Rico modified the Superior Court's judgment. It interpreted Articles 5.006 and 5.007 to require a by-election only in the event that the party of the legislator vacating the seat fails to designate a replacement within 60 days after the vacancy occurred; if the party selects a single candidate within the 60-day period, that candidate is "automatically elected to fill the vacancy," rendering a by-election unnecessary. *Popular Democratic Party* v. *Barcelo*, —— P. R. R. ——, —— (1981). The court held further that if the party presents more than one candidate during the 60-day period, a by-election must be conducted in

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elected as an independent candidate for a district, or when a vacancy occurs in the office of a senator or representative for a district, nominated by a party before the fifteen (15) months immediately preceding the date of the following general election, the Governor, with the advice of the [Commonwealth Election] Commission shall, within the thirty (30) days following the date on which the vacancy occurred, call a by-election in such district which shall be held no later than ninety (90) days after the date of the call, and the person elected in such by-election shall hold the office until the term of his predecessor has expired.

"If within sixty (60) days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate to fill such office, the office shall be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it."

Article 5.007 provides:

"All electors entitled to vote within the geographic district in which the by-election is to be held, pursuant to the call issued by the Governor to such effect, shall vote in a by-election."

which only party-affiliated candidates may run but in which all qualified electors may vote. In the event no candidate is presented within the 60-day period, candidates affiliated with any party, as well as independent candidates, are permitted to run in the by-election. Because of the delay already occasioned by the litigation, the court permitted appellee Party only 30 days from the entry of judgment, May 8, 1981, to present a "slate" of candidates to the Commonwealth Election Commission. The court ordered that "[i]f said slate is limited to only one candidate, he shall be certified by the General Administrator of Elections as the person entitled to hold the vacant seat." *Id.*, at ——.[3]

The court rejected appellants' contention that this procedure violated the United States Constitution. It noted that the Constitution does not expressly require a fixed method for filling vacancies in a state or commonwealth legislature. The court also held that Puerto Rico's party appointment system serves several "compelling interests," such as ensuring the stability and continuity of the "legislative balance" until the next general election; protecting the "electoral mandate" of the previous election; and reducing "inter-partisan political campaigns to once every four years." *Id.*, at ——.

II

Puerto Rico, in common with many of the States, has adopted means of filling interim vacancies in elective commonwealth offices without the necessity of a full-scale special election.[4] If a vacancy occurs in the office of Governor, it is

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[3] On March 22, 1981, while the case was pending before the Supreme Court of Puerto Rico, the Popular Democratic Party held a primary election in which only its members were permitted to participate. From a field of four candidates, the Party's members selected Juan Corujo Collazo. Pursuant to the Supreme Court's mandate, Corujo Collazo's name was presented to the Election Commission, and on July 6, 1981, he was sworn in as the new Representative from District 31.

[4] In 22 States, legislative vacancies are filled by appointment, with the appointee serving either until the next general election or until expiration of the term of the previous incumbent. Alaska Stat. Ann. § 15.40.320 *et*

automatically filled by the Secretary of State, an officer appointed by the Governor. P. R. Const., Art. IV, § 7. Mayoral vacancies and vacancies in the municipal assemblies are filled by appointment upon the recommendation of the political party to which the incumbent belonged. P. R. Laws Ann., Tit. 21, §§ 1161, 1259 (1974). Similarly, the Commonwealth Constitution provides that vacancies in the posts of at-large senators and representatives, see n. 13, *infra*, shall be filled "upon recommendation of the political party to which belonged the Senator or Representative causing the vacancy . . . ." Art. III, § 8. Article 5.006 of the Puerto Rico Electoral Law, as interpreted by the Supreme Court of Puerto Rico in this case, likewise confers on a political party the initial opportunity to appoint an interim replacement for one of its members who vacates a position as a district sena-

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seq. (1975) (unless term expires or election held before next legislative session convenes); Colo. Rev. Stat. § 1–12–103 (1980); Haw. Rev. Stat. §§ 17–3, 17–4 (1976 and Supp. 1981); Idaho Code § 59–904A (1976); Ill. Rev. Stat., ch. 46, ¶ 25–6 (1980); Ind. Code § 2–2.1–2–1 *et seq.* (Cum. Supp. 1981); Kan. Stat. Ann. § 25–312 (1981); Md. Const., Art. III, § 13; Mont. Code Ann. § 5–2–401 *et seq.* (1981); Neb. Rev. Stat. § 32–1042(3) (1978); Nev. Const., Art. IV, § 12 (unless biennial or regular election held between time of vacancy and next legislative session); N. M. Stat. Ann. §§ 2–7–9B, 2–8–9B (1978); N. C. Gen. Stat. § 163–11 (Cum. Supp. 1981); Ohio Const., Art. II, § 11; Ore. Rev. Stat. §§ 171.051, 171.060 (1981) (unless the legislature is not in session; a general election will be held within 90 days; and no special session of the legislature will be convened before such election); S. D. Const., Art. III, § 10; Tenn. Code Ann. § 2–14–201 *et seq.* (1979) (if less than 12 months remain before next general election); Utah Code Ann. § 20–1–5 (Supp. 1981); Vt. Stat. Ann., Tit. 17, § 2623 (Supp. 1981); Wash. Const., Amdt. 52, Art. 2, § 15; W. Va. Code § 3–10–5 (1979); Wyo. Stat. §§ 22–18–111(a)(ii), (iii) (1977). Like Puerto Rico, five of these States—Colorado, Illinois, Indiana, Maryland, and North Carolina—confer the appointment power on the political party to which the previous incumbent belonged. Nine more States—Alaska, Idaho, Montana, Ohio, Oregon, Utah, Washington, West Virginia, and Wyoming—require that the appointee be selected from a list submitted by the political party, or that the appointee be chosen or confirmed by elected officials affiliated with the party. Another two States—Hawaii and Nevada—simply require that the appointee be a member of the party to which his or her predecessor belonged.

tor or representative. In each case, the appointee serves only until the next regularly scheduled election.[5]

Appellants' challenge to the procedure mandated by Article 5.006 is essentially two-pronged. Appellants first contend that qualified voters have a federal constitutional right to elect their representatives to the Puerto Rico Legislature, and that vacancies in legislative offices therefore must be filled by a special election open to all qualified electors, not by interim appointment of any kind. Alternatively, appellants maintain that even if legislative vacancies may be filled by an interim appointment of the Governor or some other elected official, Puerto Rico's party appointment mechanism impermissibly infringes upon their right of association under the First Amendment and denies them equal protection of the laws.

A

It is not disputed that the fundamental protections of the United States Constitution extend to the inhabitants of Puerto Rico. See *Torres* v. *Puerto Rico*, 442 U. S. 465, 469–470 (1979). Cf. *Dorr* v. *United States*, 195 U. S. 138, 148 (1904). In particular, we have held that Puerto Rico is subject to the constitutional guarantees of due process and equal protection of the laws. *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 599–601 (1976); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974).[6] We thus think

[5] The current procedure for filling legislative vacancies is similar to that prescribed by a 1938 amendment to Puerto Rico's Organic Act, which remained in effect until Puerto Rico assumed Commonwealth status in 1952. In the 1938 amendment, Congress mandated that vacancies in the Puerto Rico Legislature be filled by the Governor "upon the recommendation of the central committee of the political party of which such senator or representative was a member." Act of June 1, 1938, ch. 308, § 30, 52 Stat. 595. Title 48 U. S. C. §§ 891, 892 presently provide that vacancies in the elective office of Resident Commissioner to the United States are to be filled by appointment of the Governor with the advice and consent of the Puerto Rico Senate.

[6] We have never found it necessary to resolve the precise question whether the guarantee of equal protection is provided to Puerto Ricans

it is clear that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States.

At the same time, Puerto Rico, like a state, is an autonomous political entity, "'sovereign over matters not ruled by the Constitution.'" *Calero-Toledo*, *supra*, at 673 (quoting *Mora* v. *Mejias*, 115 F. Supp. 610 (PR 1953)). See *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank*, 649 F. 2d 36, 39–42 (CA1 1981). The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference. Moreover, we should accord weight to the Puerto Rico Supreme Court's assessment of the justification and need for particular provisions to fill vacancies caused by the death, resignation, or removal of a member of the legislature. Bearing these considerations in mind, we turn to appellants' constitutional challenges.

B

No provision of the Federal Constitution expressly mandates the procedures that a state or the Commonwealth of Puerto Rico must follow in filling vacancies in its own legislature. Cf. U. S. Const., Art. I, § 2; Amdt. 17, cl. 2.[7] Appellants nevertheless maintain that qualified electors have an

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under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment. See *Examining Board* v. *Flores de Otero*, 426 U. S., at 601.

[7] With regard to Members of the United States House of Representatives, Art. I, § 2, cl. 4, provides:

"When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

The Seventeenth Amendment provides:

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

absolute constitutional right to vote for the members of a state or commonwealth legislature, even when a special election is required for this purpose.[8] However, this Court has often noted that the Constitution "does not confer the right of suffrage upon any one," *Minor* v. *Happersett*, 21 Wall. 162, 178 (1875), and that "the right to vote, *per se*, is not a constitutionally protected right," *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 35, n. 78 (1973). See *McPherson* v. *Blacker*, 146 U. S. 1, 38–39 (1892). Moreover, we have previously rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives.

For example, in *Fortson* v. *Morris*, 385 U. S. 231, 234 (1966), Justice Black, speaking for the Court, stated:

> "There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor."

In *Fortson*, the Court sustained a Georgia constitutional provision empowering the state legislature to elect a Governor from the two candidates receiving the highest number of votes cast in the general election, in the event neither received a majority. Similarly, in *Sailors* v. *Board of Education*, 387 U. S. 105 (1967), the Court upheld a statute au-

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[8] The source of this purported right is somewhat unclear. Appellants contend that Art. I, § 2, cl. 1, of the Constitution—which provides that those eligible to vote for Members of the United States House of Representatives "shall have the Qualifications requisite for the Electors of the most numerous Branch of the State Legislature"—contemplates that state legislators will be popularly elected. See also U. S. Const., Amdt. 17. Moreover, appellants contend that a popularly elected legislature is an essential element of a "Republican Form of Government," U. S. Const., Art. IV, § 4. See 48 U. S. C. § 731c, requiring Puerto Rico to provide a republican form of government. However, this seems largely irrelevant, since Puerto Rico has in fact established a legislature "whose members shall be elected by direct vote at each general election," P. R. Const., Art. III, § 1. See also Art. II, § 2, guaranteeing "equal, direct, and . . . universal suffrage . . . ."

thorizing appointment rather than election of the members of a county school board.[9]

To be sure, when a state or the Commonwealth of Puerto Rico has provided that its representatives be elected, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972). See *Kramer* v. *Union Free School District*, 395 U. S. 621, 626–629 (1969); *Gray* v. *Sanders*, 372 U. S. 368, 379–380 (1963). However, the Puerto Rico statute at issue here does not restrict access to the electoral process or afford unequal treatment to different classes of voters or political parties. All qualified voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise.[10]

In *Valenti* v. *Rockefeller*, 393 U. S. 405 (1969), the Court sustained the authority of the Governor of New York to fill a

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[9] In *Sailors*, we expressly left open the question "whether a State may constitute a local *legislative* body through the appointive rather than the elective process." 387 U. S., at 109–110 (emphasis added). However, we need not consider whether, as urged by appellants, a state or the Commonwealth of Puerto Rico is constitutionally barred from abolishing its elected legislative branch of government; that question is not presented. See n. 8, *supra*.

[10] Appellants contend that Article 5.006 "discriminates" between voters in districts in which a vacancy occurs and those in which the elected representative or senator serves out his term, because only the former are denied the opportunity to be represented by an elected legislator. Obviously, a statute designed to deal with the occasional problem of legislative vacancies will affect only those districts in which vacancies actually arise. However, such a statute is not for this reason rendered invalid under equal protection principles. A vacancy in the legislature is an unexpected, unpredictable event, and a statute providing that all such vacancies be filled by appointment does not have a special impact on any discrete group of voters or candidates. Cf. *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Williams* v. *Rhodes*, 393 U. S. 23 (1968). Appellants' equal protection argument adds nothing to their basic assertion of an absolute constitutional right to elect representatives to a state or commonwealth legislature.

vacancy in the United States Senate by appointment pending the next regularly scheduled congressional election—in that case, a period of over 29 months.[11] Thus, although most Members of the United States Senate hold office by virtue of popular election, some Members, at any given time, may hold office by virtue of an interim appointment. The Court found nothing invidious or arbitrary in this distinction in *Valenti*, nor do we here. As the three-judge District Court observed in *Valenti:*

> "In this case we are confronted with no fundamental imperfection in the functioning of democracy. No political party or portion of the state's citizens can claim it is permanently disadvantaged . . . or that it lacks effective means of securing legislative reform if the statute is regarded as unsatisfactory. We have, rather, only the unusual, temporary, and unfortunate combination of a tragic event and a reasonable statutory scheme." *Valenti* v. *Rockefeller*, 292 F. Supp. 851, 867 (SDNY 1968).

Valenti, of course, unlike this case, involved an interpretation of the Seventeenth Amendment, which explicitly outlines the procedures for filling vacancies in the United States Senate. See n. 7, *supra*. However, the fact that the Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature. We discern nothing in the Federal Constitution that imposes greater constraints on the Commonwealth of Puerto Rico.

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[11] In *Valenti*, the vacancy was created by the death of Senator Robert F. Kennedy on June 6, 1968. Under New York law, since the vacancy arose less than 60 days prior to New York's regular spring primary in an even-numbered year, an election to fill the vacancy would not be held until the general election in the next even-numbered year, *i. e.*, November 1970. The Governor was empowered to make an interim appointment, effective until December 1, 1970. See *Valenti* v. *Rockefeller*, 292 F. Supp. 851, 853 (SDNY 1968) (three-judge District Court).

The Commonwealth's choice to fill legislative vacancies by appointment rather than by a full-scale special election may have some effect on the right of its citizens to elect the members of the Puerto Rico Legislature; however, the effect is minimal, and like that in *Valenti*, it does not fall disproportionately on any discrete group of voters, candidates, or political parties. See n. 10, *supra*. Moreover, the interim appointment system plainly serves the legitimate purpose of ensuring that vacancies are filled promptly, without the necessity of the expense and inconvenience of a special election. The Constitution does not preclude this practical and widely accepted means of addressing an infrequent problem.

C

Puerto Rico's appointment mechanism is not rendered constitutionally defective by virtue of the fact that the interim appointment power is given to the political party with which the previous incumbent was affiliated. Appellants maintain that the power to make interim appointments must be vested in an elected official, such as the Governor of the Commonwealth, so that the appointments will have "the legitimacy of derivative voter approval and control." Reply Brief for Appellants 15. However, that such control may often be largely illusory is illustrated by this case, where the Governor and the incumbent belonged to different parties. The Puerto Rico Legislature could reasonably conclude that appointment by the previous incumbent's political party would more fairly reflect the will of the voters than appointment by the Governor or some other elected official.[12]

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[12] See *Garcia* v. *Barcelo*, 671 F. 2d 1, 6 (CA1 1982):

"One might argue, as a matter of form, that appointment by a governor is indeed more 'democratic' because the governor is himself elected. Yet in practice this is not likely to be so when the governor and former representative are of different parties. In that case the party difference is likely to produce successors of different parties. In such circumstances, we see how the framers of a state constitution might conclude that party selection is more likely to reflect the will of the voters than selection by the

The Supreme Court of Puerto Rico held that party appointment was a legitimate mechanism serving to protect the mandate of the preceding election and to preserve the "legislative balance" until the next general election is held. Such protection is particularly important in light of Puerto Rico's special interest in ensuring minority representation in its legislature.[13] See *Garcia* v. *Barcelo*, 671 F. 2d 1, 6–7 (CA1 1982). It was thus not unreasonable for the Puerto Rico Legislature, in establishing an appointment system for filling legislative vacancies, to make provision for continuity of party representation. Cf. *Kaelin* v. *Warden*, 334 F. Supp. 602, 607–608 (ED Pa. 1971) (three-judge District Court).[14] Absent some clear constitutional limitation, Puerto Rico is free

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governor, for it was the former representative's party, not that of the governor, that won the prior seat. Such a judgment, reflecting a knowledge of political practice, seems perfectly consistent with the basic democratic role of the modern political party—translating the individual wills of myriad voters into a practically achievable program administered by a government that can be held responsible for its performance at the polls."

[13] Two devices in Puerto Rico's Constitution ensure representation of minority parties in the Puerto Rico Legislative Assembly. First, 11 of 27 senators and 11 of 51 representatives are elected "at-large," and each voter may vote for only one candidate for senator or representative at-large. Art. III, § 3. Second, if any one party elects more than two-thirds of the members of either house of the legislature, the number of members in that house is increased by declaring elected a sufficient number of minority-party candidates to bring the total number of minority-party members to 9 in the Senate and to 17 in the House. Art. III, § 7. Appellees maintain that "the Commonwealth's unique guarantee of minority party representation . . . is and has been particularly important in Puerto Rico, far beyond its importance in any State of the Union, in order to provide a democratic forum and an outlet for the radically different views of the various political parties as to the ultimate status of Puerto Rico . . . ." Brief for Appellees 14.

[14] Puerto Rico is in no sense unique in maintaining continuity of party representation between elections; 16 States have chosen to require that legislative vacancies be filled by appointment of a person affiliated with the same party as the previous incumbent, or by designation of that party, see n. 4, *supra*.

to structure its political system to meet its "special concerns and political circumstances," *Garcia*, *supra*, at 7.

Finally, appellants argue that their rights of association and equal protection of the laws were violated by their exclusion, based solely upon their party affiliation, from the Party-sponsored election held to select Muniz' successor, see n. 3, *supra*. Cf. *Branti* v. *Finkel*, 445 U. S. 507 (1980). However, appellants' argument misconceives the nature of the election held in this case. Puerto Rico law authorized the Popular Democratic Party to designate an interim replacement to fill Muniz' seat. The Party was entitled to adopt its own procedures to select this replacement; it was not required to include nonmembers in what can be analogized to a party primary election. Cf. *Democratic Party of U. S.* v. *Wisconsin*, 450 U. S. 107 (1981); *Cousins* v. *Wigoda*, 419 U. S. 477 (1975). Appellants' exclusion from this election did not violate their rights of association, nor did it deprive them of equal protection of the laws.

III

We hold that the mechanism adopted by the Puerto Rico Legislature for filling legislative vacancies is not foreclosed by the Federal Constitution. Accordingly, the judgment of the Supreme Court of Puerto Rico is

Affirmed.

Syllabus

JACKSON TRANSIT AUTHORITY ET AL. *v.* LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL–CIO–CLC

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81–411. Argued April 21, 1982—Decided June 7, 1982

Section 13(c) of the Urban Mass Transportation Act of 1964 requires a state or local government to make arrangements to preserve transit workers' existing collective-bargaining rights before that government may receive federal financial assistance for the acquisition of a privately owned transit company. Petitioner city entered into a "§ 13(c) agreement" with respondent transit union in order to obtain federal funds to acquire a failing private bus company and convert it into petitioner Jackson Transit Authority. Thereafter, the Authority's unionized workers were covered by a series of collective-bargaining agreements. In 1975, however, the Authority notified the union that it no longer considered itself bound by the newest of the collective-bargaining agreements. The union subsequently filed suit in Federal District Court, seeking damages and injunctive relief and alleging that petitioners had breached the § 13(c) and collective-bargaining agreements. The District Court held that it lacked subject-matter jurisdiction because the complaint rested on contract rights that should be enforced only in a state court. The Court of Appeals reversed, holding that there was subject-matter jurisdiction because the claim arose under a federal law, specifically § 13(c), and that § 13(c) implicitly provided a federal private right of action.

Held: Section 13(c) does not provide the union with federal causes of action for alleged breaches of the § 13(c) and collective-bargaining agreements. While § 13(c)'s language supplies no definitive answer, the legislative history is conclusive that Congress intended that such agreements be governed by state law applied in state courts. Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law. Pp. 20–29.

650 F. 2d 1379, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 29.

Joseph S. Kaufman argued the cause for petitioners. With him on the briefs was *William R. Rice.*

Linda R. Hirshman argued the cause for respondent. With her on the brief was *Earle Putnam.**

JUSTICE BLACKMUN delivered the opinion of the Court.

Under § 13(c) of the Urban Mass Transportation Act of 1964 (Act or UMTA), 78 Stat. 307, as amended, 49 U. S. C. § 1609(c),[1] a state or local government must make arrangements to preserve transit workers' existing collective-bargaining rights before that government may receive federal financial assistance for the acquisition of a privately owned transit company. This case presents the issue whether § 13(c) by itself permits a union to sue in federal court for alleged violations of an arrangement of this kind or of the collective-bargaining agreement between the union and the local government transit authority.

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*Briefs of *amici curiae* urging reversal were filed by *John J. Vlahos* and *Ray E. McDevitt* for the American Public Transit Association; by *Benjamin L. Brown, J. Lamar Shelley, James B. Brennan, Henry W. Underhill, Jr., George Agnost, Roger F. Cutler, John Dekker, Lee E. Holt, George F. Knox, Jr., Walter M. Powell, William H. Taube, John W. Witt, Max P. Zall, Conard B. Mattox, Jr.,* and *Charles S. Rhyne* for the National Institute of Municipal Law Officers; by *William J. Olson* and *James H. Wentzel* for the Public Service Research Council; and by *Donald H. Clark* and *Gregory A. Giordano* for the Tidewater Transportation District Commission.

Edward J. Hickey, Jr., Michael S. Wolly, and *Thomas A. Woodley* filed a brief for the Railway Labor Executives' Association as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Joseph H. Elcock* and *Ronald G. Busconi* for the Massachusetts Bay Transportation Authority; and by *W. Stell Huie* and *Terrence Lee Croft* for the Metropolitan Atlanta Rapid Transit Authority.

[1] Originally, § 13(c) was § 10(c). In 1966, the Act was amended, and the section received its present designation. Pub. L. 89–562, § 2(b)(1), 80 Stat. 716. Throughout this opinion, it is referred to as § 13(c).

I

A

When the Act was under consideration in the Congress, that body was aware of the increasingly precarious financial condition of a number of private transportation companies across the country, and it feared that communities might be left without adequate mass transportation. See S. Rep. No. 82, 88th Cong., 1st Sess., 4–5, 19–20 (1963). The Act was designed in part to provide federal aid for local governments in acquiring failing private transit companies so that communities could continue to receive the benefits of mass transportation despite the collapse of the private operations. See §§ 2(b) and 3, as amended, 49 U. S. C. §§ 1601(b) and 1602.

At the same time, however, Congress was aware that public ownership might threaten existing collective-bargaining rights of unionized transit workers employed by private companies. If, for example, state law forbade collective bargaining by state and local government employees, the workers might lose their collective-bargaining rights when a private company was acquired by a local government. See Urban Mass Transportation—1963, Hearings on S. 6 and S. 917 before a Subcommittee of the Senate Committee on Banking and Currency, 88th Cong., 1st Sess., 318–323 (1963) (Senate Hearings) (statement of Andrew J. Biemiller, Director, Department of Legislation, AFL–CIO). To prevent federal funds from being used to destroy the collective-bargaining rights of organized workers, Congress included § 13(c) in the Act. See H. R. Rep. No. 204, 88th Cong., 1st Sess., 15–16 (1963).

Section 13(c) requires, as a condition of federal assistance under the Act, that the Secretary of Labor certify that "fair and equitable arrangements" have been made "to protect the interests of employees affected by [the] assistance." The statute lists several protective steps that must be taken before a local government may receive federal aid; among these

are the preservation of benefits under existing collective-bargaining agreements and the continuation of collective-bargaining rights. The protective arrangements must be specified in the contract granting federal aid.[2]

B

In 1966, petitioner city of Jackson, Tenn., applied for federal aid to convert a failing private bus company into a public entity, petitioner Jackson Transit Authority. See App. 12a–16a. In order to satisfy § 13(c), the Authority so created entered into a "§ 13(c) agreement" with respondent Local Division 1285, Amalgamated Transit Union, AFL–CIO–CLC, the union that represented the private company's employees. See 29 CFR pt. 215 (1981). Among other things, the § 13(c) agreement guaranteed the preservation of the transit workers' collective-bargaining rights. App. 16a–20a. The Secretary of Labor certified that the agreement was "fair and equitable." Its substance was made a part of the grant contract between the city and the United States, and the city received approximately $279,000 in federal aid.

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[2] Section 13(c) reads in full:

"It shall be a condition of any assistance under section 3 of this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

Thereafter, until 1975, the Authority's unionized workers were covered by a series of collective-bargaining agreements. Six months after a new 3-year collective-bargaining agreement was signed in 1975, see *id.*, at 31a, however, the Authority notified the union that it no longer considered itself bound by that contract. See *id.*, at 45a.[3]

Ultimately, the union filed suit in the United States District Court for the Western District of Tennessee. It sought damages and injunctive relief, alleging that petitioners had breached the § 13(c) agreement and the collective-bargaining contract. App. 8a, 10a–11a.[4] The District Court concluded that it lacked subject-matter jurisdiction to hear the suit because the complaint rested on contract rights that should be enforced only in a state court. 447 F. Supp. 88 (1977).

The United States Court of Appeals for the Sixth Circuit reversed. 650 F. 2d 1379 (1981). Relying on *Bell* v. *Hood*, 327 U. S. 678 (1946), that court first determined that it had subject-matter jurisdiction under 28 U. S. C. § 1331, because the union's claim arose under the laws of the United States,

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[3] According to the union's complaint, the Authority since 1966 had contracted with a private individual, T. O. Petty, for the management of the transportation system. App. 6a–7a. The union negotiated its 1975 contract with Petty; when he left as manager of the system, the Authority claimed it was not bound by the contract he had negotiated. *Id.*, at 47a. The union alleged that petitioners had promised in the § 13(c) agreement to be bound by the contracts Petty had signed and that petitioners violated both the § 13(c) agreement and the 1975 collective-bargaining contract. App. 7a–8a.

[4] Prior to filing suit, the union asked the Secretary of Labor and the Secretary of Transportation to find that petitioners had violated the § 13(c) agreement and to ensure that petitioners complied with the agreement. Both Secretaries refused. See 650 F. 2d 1379, 1381 (CA6 1981).

In addition to relief directed at petitioners, the union requested that the two Secretaries be ordered to take appropriate enforcement action against petitioners to compel compliance with the § 13(c) agreement. App. 11a. Both the District Court and the Court of Appeals refused the union's request. See 447 F. Supp. 88, 90–92 (1977); 650 F. 2d, at 1387–1388. The union has not sought review of this ruling, and we express no opinion on that aspect of the litigation.

specifically § 13(c). The court then held that § 13(c) implicitly provides a federal private right of action. Section 13(c) reflects national labor policy, the Court of Appeals reasoned, and the rights protected by the statute are thus federal rights. The court concluded that it was consistent with the congressional intent behind § 13(c) to permit enforcement of these federal rights in federal court.

Because of the importance of the interpretation of § 13(c) for local transit labor relations,[5] we granted certiorari. 454 U. S. 1079 (1981).

II

While the Court of Appeals treated this as a private right of action case, see, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353 (1982), it does not fit comfortably in that mold. Indeed, since § 13(c) contemplates protective arrangements between grant recipients and unions as well as subsequent collective-bargaining agreements between those parties, see H. R. Rep. No. 204, 88th Cong., 1st Sess., 16 (1963), it is reasonable to conclude that Congress expected the § 13(c) agreement and the collective-bargaining agreement, like ordinary contracts, to be enforce-

[5] Several Courts of Appeals, in addition to the Sixth Circuit, have decided that § 13(c) authorizes federal suits for violations of § 13(c) agreements and collective-bargaining contracts between recipients of UMTA funds and transit unions. *Division 587, Amalgamated Transit Union, AFL–CIO* v. *Municipality of Metropolitan Seattle*, 663 F. 2d 875 (CA9 1981); *Local Div. 714, Amalgamated Transit Union, AFL–CIO* v. *Greater Portland Transit District*, 589 F. 2d 1 (CA1 1978); *Local Div. 519, Amalgamated Transit Union, AFL–CIO* v. *LaCrosse Municipal Transit Utility*, 585 F. 2d 1340 (CA7 1978); *Division 1287, Amalgamated Transit Union, AFL–CIO* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (CA8 1978), cert. denied, 439 U. S. 1090 (1979). One Court of Appeals has reached the opposite conclusion. *Local Div. 732, Amalgamated Transit Union* v. *Metropolitan Atlanta Rapid Transit Authority*, 667 F. 2d 1327 (CA11 1982). In a related decision, the First Circuit has concluded that the terms of § 13(c) agreements do not override conflicting provisions of state law. *Local Div. 589, Amalgamated Transit Union, AFL–CIO* v. *Massachusetts*, 666 F. 2d 618 (1981), cert. pending, No. 81–1817.

able by private suit upon a breach. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 18–19 (1979). The gist of the union's position is not that § 13(c) creates an implied right of action to sue for violations of the statute. Instead, the union argues that "[i]t was the intent of Congress that federal law would determine the binding effect of labor protective agreements under § 13(c) and of the collective bargaining agreements reached pursuant to § 13(c) between unions and recipients of UMTA funds" so that those agreements "are enforceable in the federal courts." Brief for Respondent 24.

The issue, then, is not whether Congress intended the union to be able to bring contract actions for breaches of the two contracts, but whether Congress intended such contract actions to set forth federal, rather than state, claims. Admittedly, since the private right of action decisions address the related question whether Congress intended that a particular party be able to bring suit under a federal statute, those decisions may provide assistance in resolving this case. But the precise question before us is whether the union's contract actions are federal causes of action, not whether the union can bring suit at all to enforce its contracts. See *Local Div. 732, Amalgamated Transit Union* v. *Metropolitan Atlanta Rapid Transit Authority*, 667 F. 2d 1327, 1329–1334 (CA11 1982).[6]

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[6]Thus, we agree with the Court of Appeals that, strictly speaking, the District Court had jurisdiction under 28 U. S. C. § 1331 to hear the union's suit. Under *Bell* v. *Hood*, 327 U. S. 678, 681 (1946), jurisdiction exists if the complaint is "drawn so as to claim a right to recover under the Constitution and laws of the United States." The complaint alleged a violation of the § 13(c) agreement required by the UMTA and of the subsequent collective-bargaining agreement contemplated by the Act, and prayed for relief under federal law. We do not consider the union's asserted federal claims to be "wholly insubstantial and frivolous," 327 U. S., at 682–683, so that the District Court lacked jurisdiction to entertain the union's suit. Thus, the District Court had jurisdiction for the purposes of determining whether the union stated a cause of action on which relief could be granted. *Id.*, at 682. See also *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963).

As the union points out, on several occasions the Court has determined that a plaintiff stated a federal claim when he sued to vindicate contractual rights set forth by federal statutes, despite the fact that the relevant statutes lacked express provisions creating federal causes of action. In *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 (1963), the Court held that a union had a federal cause of action to enforce an award of an airline adjustment board included in a collective-bargaining contract pursuant to § 204 of the Railway Labor Act, 45 U. S. C. § 184 (1958 ed.). Similarly, in *Norfolk & Western R. Co.* v. *Nemitz*, 404 U. S. 37 (1971), the Court ruled that a railroad's employees made out federal claims when they sought to enforce assurances made by the railroad to secure the Interstate Commerce Commission's approval of a consolidation under a provision of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f) (1970 ed.). And recently, in an analogous private right of action decision, the Court permitted a federal suit for rescission of a contract declared void by § 215 of the Investment Advisers Act of 1940, 15 U. S. C. § 80b–15, although the statute itself made no express provision for private suits. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S., at 18–19. See also *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 388 (1970) (recognizing federal right to rescind contracts rendered void by § 29(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78cc(b)); *American Surety Co.* v. *Shulz*, 237 U. S. 159 (1915) (finding federal-question jurisdiction to hear suit on supersedeas bond required by Rev. Stat. § 1007).

These decisions demonstrate that suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes. But they do not dictate the result in this case. Whenever we determine the scope of rights and remedies under a federal statute, the critical factor is the congressional intent behind the particular provision at issue. See, *e. g.*,

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U. S., at 18; *Cannon* v. *University of Chicago*, 441 U. S. 677, 688 (1979); *Machinists* v. *Central Airlines, Inc.*, 372 U. S., at 685–692; see also n. 9, *infra*. Thus, if Congress intended that § 13(c) agreements and collective-bargaining agreements be "creations of federal law," *Machinists* v. *Central Airlines, Inc.*, 372 U. S., at 692, and that the rights and duties contained in those contracts be federal in nature, see *id.*, at 695, then the union's suit states federal claims. Otherwise, the union's complaint presents only state-law claims. See *Miree* v. *De Kalb County*, 433 U. S. 25 (1977).

III

We begin with the language of the statute itself. See, *e. g.*, *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754, 771 (1981). The bare language of § 13(c) is not conclusive. In some ways, the statute seems to make § 13(c) agreements and collective-bargaining contracts creatures of federal law. Section 13(c) demands "fair and equitable arrangements" as prerequisites for federal aid; it requires the approval of the Secretary of Labor for those arrangements; it specifies five different varieties of protective provisions that must be included among the § 13(c) arrangements; and it expressly incorporates the protective arrangements into the grant contract between the recipient and the Federal Government.[7] See n. 2, *supra*. On the other hand, labor relations between local governments and their employees are the subject of a longstanding statutory exemption from the National Labor Relations Act. 29 U. S. C. § 152(2). Section 13(c) evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the rela-

[7] The statute also provides that the protective "arrangements shall include provisions . . . which shall in no event provide benefits less than those established pursuant to section 5(2)(f). . . ." As we explain, see n. 9, *infra*, this portion of the statute strengthens the union's position, but we do not consider it at all determinative.

tionships between local governmental entities and the unions representing their employees. See *Cort* v. *Ash*, 422 U. S. 66, 78 (1975) (noting reluctance to permit suit in federal court when "the cause of action [is] one traditionally relegated to state law").

While the statutory language supplies no definitive answer, the legislative history is conclusive. A consistent theme runs throughout the consideration of § 13(c): Congress intended that labor relations between transit workers and local governments would be controlled by state law.

In 1963, Secretary of Labor Wirtz presented the original version of § 13(c) to the relevant House and Senate Committees. Before both Committees, Members of Congress expressed concern about the effect of the statute on state laws. And Secretary Wirtz explained to both Committees that, while attempts would be made to accommodate state law to the preservation of collective-bargaining rights, state law would control local transit labor relations. The Secretary told the House Committee that "this proposal is submitted on this basis, . . . that the State laws must control." Urban Mass Transportation Act of 1963, Hearings on H. R. 3881 before the House Committee on Banking and Currency, 88th Cong., 1st Sess., 482 (1963) (House Hearings). A Committee member raised the issue again; the Secretary repeated that "State laws would be controlling in the situation," though he suggested that there "would be few, if any, situations" where state law and § 13(c) could not be reconciled. House Hearings, at 486. When similar concerns were expressed during his testimony before the Senate Committee, the Secretary reiterated: "I should like it quite clear that I think that there could be no superseding here of the State law." Senate Hearings, at 313.

The House and Senate Reports took the Secretary at his word. The House Report advised that § 13(c) would ensure protection of the interests of workers, but that "subject to the basic standards set forth in the bill, specific conditions for worker protection will normally be the product of local bar-

gaining and negotiation." H. R. Rep. No. 204, 88th Cong., 1st Sess., 16 (1963). The Senate Report was more direct: "In regard to the question as to whether these provisions would supersede State labor laws, the committee concurs in a statement made by the Secretary of Labor 'that there could be no superseding of State laws by a provision of this kind.'" S. Rep. No. 82, 88th Cong., 1st Sess., 29 (1963).

During the debates, the role of state law under § 13(c) was discussed at length. Senators Goldwater and Tower suggested that § 13(c) would supplant state law with federal law. 109 Cong. Rec. 5416 (1963). Senator Williams, one of the bill's chief sponsors, replied: "The legislative history has to be corrected" because "we must have a record that will show that the bill does not preempt State law; it does not control or dominate with irrevocable authority local situations." *Id.*, at 5417. The proposed statute, Senator Williams continued, would not "preempt or be a substitute for State law." *Ibid.* Senator Goldwater remained adamant that "we are attempting a major alteration in the Nation's labor laws." *Id.*, at 5418. But Senator Sparkman, the Chairman of the Senate Committee, repeated the Secretary's assurance that § 13(c) "will not supersede or displace or override" state law. 109 Cong. Rec. 5418 (1963).[8]

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[8] The union points to the fact that Congress rejected amendments that would have required the continuation of collective-bargaining rights only to the extent not inconsistent with state law. See 109 Cong. Rec. 5422 (1963); *id.*, at 5582; *id.*, at 5684; 110 Cong. Rec. 14980 (1964). But, as Senator Williams explained, those amendments were rejected not because Congress thought § 13(c) would supplant state labor law but because such an amendment was "clearly . . . unnecessary" to guarantee that § 13(c) would not "supersede or preempt or override State law." 109 Cong. Rec. 5421 (1963). Accord: 110 Cong. Rec. 14980 (1964) (remarks of Reps. Multer and Rains).

Beyond the explanation given by Senator Williams and repeated on the House floor, the defeat of these amendments merely reflected a congressional intent that the Federal Government be able to seek changes in state law and ultimately to refuse financial assistance when state law prevented compliance with § 13(c). See 109 Cong. Rec. 5684 (1963) (remarks of Sen. Morse); *id.*, at 5422 (remarks of Sen. Javits).

The Senate returned to the issue during a colloquy between Senator Goldwater and Senator Morse. Senator Goldwater feared that the proposed statute would override state laws denying public employees the right to strike. *Id.*, at 5673. Senator Morse assured Senator Goldwater otherwise that "the State law would supervene." *Ibid.* When Senator Goldwater inquired about state laws other than those concerning the right to strike, Senator Morse replied in the same vein: "The amendment does not supersede any State policy." *Ibid.*

In an important exchange, Senator Goldwater noted that local government employers were excluded from the coverage of the National Labor Relations Act, see 29 U. S. C. § 152(2), and asked whether § 13(c) would be inconsistent with that exclusion. 109 Cong. Rec. 5673–5674 (1963). Senator Morse responded that the language of the bill "make[s] it clear that the Taft-Hartley exemptions are not changed by the amendment." *Id.*, at 5674. See also *id.*, at 5422 (remarks of Sen. Javits) (state law could not be overridden "under any phase of the Taft-Hartley law"). Senator Morse underscored the purpose of the amendment: "I cannot emphasize the point more than I already have done in the legislative history in our debate. It deals with municipal and State problems, and not Federal problems." *Id.*, at 5674. Finally, Senator Goldwater asked whether state law would control if there were no specific state law forbidding strikes by public employees. Senator Morse adhered to the same course: "In the absence of any local law, it would be for the State court to decide whether [the employees] had that right." *Ibid.*

A similar, but more abbreviated, interchange took place on the House floor. When some Congressmen questioned the effect of § 13(c) on state law, they were reassured by Congressman Multer that "[n]othing in this bill . . . will infringe upon local law, whether it be of a State or municipality." 110

Cong. Rec. 14980 (1964). And Congressman Rains repeated, "there is not one line in this bill that would vitiate in any way any State or local law." *Ibid.*

Thus, Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers.[9] Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations. Congress intended that § 13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid

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[9] In light of the legislative history of § 13(c), we do not find *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979), or *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 (1963), to be controlling. Both cases turned on the language, purpose, and legislative history of the particular statute involved, see *Transamerica*, 444 U. S., at 18–19; *Machinists*, 372 U. S., at 685–695, and we read the congressional intent behind § 13(c) to be far different from the congressional purpose underlying the statutes at issue in those cases.

Norfolk & Western R. Co. v. *Nemitz*, 404 U. S. 37 (1971), of course, is not to be overlooked. In that case, the Court decided that a railroad's employees stated federal claims when they alleged a breach of an agreement entered into by the railroad under § 5(2)(f) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f) (1970 ed.). Section 13(c) refers to § 5(2)(f) and provides that the protective arrangements shall not provide benefits less than those established by § 5(2)(f). See nn. 2 and 7, *supra*. If, when it passed § 13(c), Congress had expressed an awareness that § 5(2)(f) assurances could be enforced in federal court, or if there was reason to presume such awareness, the reference in § 13(c) to § 5(2)(f) would make this a different case. See generally *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353 (1982). But the legislative history contains no such congressional recognition. Furthermore, *Nemitz* was decided several years after § 13(c) was enacted. Consequently, we find the specific legislative history of § 13(c), not the holding of *Nemitz*, to be determinative.

could be used to convert private companies into public entities.[10] See 109 Cong. Rec. 5673 (1963) (remarks of Sen. Morse) (if city proposed to reject collective bargaining, it would be ineligible for federal aid). But Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law.[11]

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[10] The union relies upon the fact that Congress strengthened the language of § 13(c) during the course of its passage. Congress wrote § 13(c) to require protective provisions "necessary for" the protection of collective-bargaining rights, rather than provisions "as are found to be appropriate for" the protection of those rights, as the Kennedy administration had recommended. See House Hearings, at 476; 110 Cong. Rec. 14976 (1964). In addition, § 13(c)(2) was amended at the request of Senator Morse to require the "continuation" of collective-bargaining rights rather than the mere "encouragement" of the continuation of those rights. See 109 Cong. Rec. 5627 (1963); *id.*, at 5685. But these alterations in the bill demonstrate only that Congress demanded that the Secretary ensure that state law preserved collective-bargaining rights before he provided federal aid for acquisition of a private transit company. When viewed in conjunction with the discussion of state law in the legislative history, the modifications of the original bill do not prove that Congress intended that federal rather than state law would govern a contract between a UMTA aid recipient and a union representing its employees.

[11] Senator Javits summarized:

"[W]e have a balanced scheme. We do not override the [state] law; at the same time, we do not compel the Federal Government to go in where the law is adverse to the interest of labor and labor's own point of view, and perhaps also even give encouragement to exempt a situation of this kind where the State desires to get this type of Federal help." 109 Cong. Rec. 5422 (1963).

There remains the possibility that Congress might have intended a federal court to hear the union's claims, but to apply state law. Such an anomalous result would be inconsistent with the emphasis in the legislative history that § 13(c) addresses "municipal and State problems, and not Federal problems," *id.*, at 5674. Thus, unless there is an independent source of jurisdiction, such as diversity or pendent jurisdiction, the union must sue in state court. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S., at 19, n. 8; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 506–507 (1900).

IV

Given this explicit legislative history, we cannot read § 13(c) to create federal causes of action for breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions.[12] The legislative history indicates that Congress intended those contracts to be governed by state law applied in state courts.[13]

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, concurring.

As the Court notes, this case "does not fit comfortably in

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[12] Based on the legislative history, we could not permit the union to bring a federal suit if we characterized its complaint as alleging that petitioners violated § 13(c) itself by virtue of the alleged contractual breaches. See Brief for Respondent 33-34.

Nor does 42 U. S. C. § 1983 (1976 ed., Supp. IV) permit the union to bring suit. As the Court held in *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), § 1983 encompasses deprivations of rights secured by all "laws" of the United States, of which § 13(c) is, of course, one. But because we have determined that Congress did not intend that breaches of § 13(c) agreements or collective-bargaining contracts would constitute deprivations of federal rights secured by § 13(c), the union has no cause of action under § 1983. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 19–21 (1981).

[13] There are other possible remedies for violations of § 13(c) agreements and collective-bargaining contracts. The union, of course, can pursue a contract action in state court. In addition, the Federal Government can respond by threatening to withhold additional financial assistance. See *Local Div. 589*, 666 F. 2d, at 634–635.

While we hold that the union cannot sue in federal court to enforce its contracts, we express no view on the entirely separate question whether the Federal Government could bring a federal suit against a UMTA funding recipient for violating the terms of its grant agreement with the Government. Such a suit would involve a different contract from the § 13(c) agreement and the collective-bargaining agreement at issue in this case. See generally *Local Div. 732*, 667 F. 2d, at 1338–1339; *Local Div. No. 714*, 589 F. 2d, at 13.

[the] mold" of our implied right of action cases. *Ante*, at 20. Congress here provided for the making of contracts that it must have intended to be enforced. The Court thus identifies the question correctly as whether Congress intended those contracts to be enforced in federal court. *Ante*, at 21. This of course is precisely the question on which implied rights of action cases properly are decided. See, *e. g.*, *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981).

There are other parallels between this case and those in the more familiar implied right of action "mold." Most significantly to me, both kinds of cases involve the same fundamental issues of congressional and judicial power. By enforcing contract rights not within the jurisdictional grant conferred by Congress, as much as by improperly "inferring" a right of action, "a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. . . . This runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . .' *American Fire & Cas. Co.* v. *Finn*, 341 U. S. 6, 17 (1951), and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." *Cannon* v. *University of Chicago*, 441 U. S. 677, 746–747 (1979) (POWELL, J., dissenting).

Because a federal court should exercise extreme caution before assuming jurisdiction not clearly conferred by Congress, we should not condone the implication of federal jurisdiction over contract claims in the absence of an unambiguous expression of congressional intent. As I do not view this position as inconsistent with the reasoning of the Court, I join its opinion.

TIBBS *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 81–5114. Argued March 2, 1982—Decided June 7, 1982

Held: Where the Florida Supreme Court's reversal of petitioner's murder and rape convictions at a jury trial was based on the weight of the evidence, a retrial is not barred by the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment. Pp. 39–47.

(a) A reversal of a conviction based on the weight of the evidence, unlike a reversal based on insufficient evidence where the Double Jeopardy Clause precludes a retrial, *Burks* v. *United States*, 437 U. S. 1; *Greene* v. *Massey*, 437 U. S. 19, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. Just as a deadlocked jury does not result in an acquittal barring retrial under the Double Jeopardy Clause, an appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal. Moreover, a reversal based on the weight of the evidence can occur only after the State has presented sufficient evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek an acquittal. Giving him this second chance does not amount to governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect. Pp. 39–44.

(b) There is no merit to petitioner's arguments that a distinction between the weight and sufficiency of the evidence is unworkable and will undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence. Pp. 44–45.

397 So. 2d 1120, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 47.

Louis R. Beller, by appointment of the Court, 454 U. S. 1078, argued the cause and filed a brief for petitioner.

Deborah A. Osmond, Assistant Attorney General of Florida, argued the cause *pro hac vice* for respondent. With her

on the briefs were *Jim Smith*, Attorney General, and *Michael A. Palecki*, Assistant Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to decide whether the Double Jeopardy Clause[1] bars retrial after a state appellate court sets aside a conviction on the ground that the verdict was against "the weight of the evidence." After examining the policies supporting the Double Jeopardy Clause, we hold that a reversal based on the weight, rather than the sufficiency, of the evidence permits the State to initiate a new prosecution.

I

In 1974, Florida indicted petitioner Delbert Tibbs for the first-degree murder of Terry Milroy, the felony murder of Milroy, and the rape of Cynthia Nadeau. Nadeau, the State's chief trial witness, testified that she and Milroy were hitchhiking from St. Petersburg to Marathon, Fla., on February 3, 1974. A man in a green truck picked them up near Fort Myers and, after driving a short way, turned off the highway into a field. He asked Milroy to help him siphon gas from some farm machinery, and Milroy agreed. When Nadeau stepped out of the truck a few minutes later, she discovered the driver holding a gun on Milroy. The driver told Milroy that he wished to have sex with Nadeau, and ordered her to strip. After forcing Nadeau to engage in sodomy, the driver agreed that Milroy could leave. As Milroy started to walk away, however, the assailant shot him in the shoulder. When Milroy fell to the ground, pleading for his life, the gunman walked over and taunted, "Does it hurt, boy? You in

Solicitor General Lee, Assistant Attorney General Jensen, Samuel J. Alito, Jr., and *John Fichter De Pue* filed a brief for the United States as *amicus curiae* urging affirmance.

[1] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5. The Clause applies to the States through the Due Process Clause of the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U. S. 784 (1969).

pain? Does it hurt, boy?" Tr. 508. Then, with a shot to the head, he killed Milroy.

This deed finished, the killer raped Nadeau. Fearing for her life, she suggested that they should leave together and that she "would be his old lady." *Id.*, at 510. The killer seemed to agree and they returned to the highway in the truck. After driving a short distance, he stopped the truck and ordered Nadeau to walk directly in front of it. As soon as her feet hit the ground, however, she ran in the opposite direction. The killer fled with the truck, frightened perhaps by an approaching car. When Nadeau reached a nearby house, the occupants let her in and called the police.

That night, Nadeau gave the police a detailed description of the assailant and his truck. Several days later a patrolman stopped Tibbs, who was hitchhiking near Ocala, Fla., because his appearance matched Nadeau's description. The Ocala Police Department photographed Tibbs and relayed the pictures to the Fort Myers police. When Nadeau examined these photos, she identified Tibbs as the assailant.[2] Nadeau subsequently picked Tibbs out of a lineup and positively identified him at trial as the man who murdered Milroy and raped her.[3]

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[2] The State's witnesses conceded that, at the time of this identification, Nadeau saw only photographs of Tibbs; she did not have the opportunity to pick his picture out of a photographic array. An officer explained, however, that Nadeau had viewed photographs of single suspects on three or four other occasions and had not identified the killer on any of those occasions. Nadeau also had examined several books of photographs without making an identification. We do not pass upon any possible due process questions raised by the State's identification procedures, see generally *Neil* v. *Biggers*, 409 U. S. 188 (1972); *Simmons* v. *United States*, 390 U. S. 377 (1968), because Tibbs' challenge to retrial rests solely upon double jeopardy grounds.

[3] The State's remaining witnesses included law enforcement agents, a man who had driven Milroy and Nadeau to Fort Myers, the houseowner who had called the police for Nadeau, acquaintances of Milroy, a doctor who had examined Nadeau shortly after the crimes, and the doctor who had performed the autopsy on Milroy. The doctors confirmed that Nadeau had had intercourse on the evening of February 3 and that Milroy

Tibbs' attorney attempted to show that Nadeau was an unreliable witness. She admitted during cross-examination that she had tried "just about all" types of drugs and that she had smoked marihuana shortly before the crimes occurred. *Id.*, at 526, 545–546. She also evidenced some confusion about the time of day that the assailant had offered her and Milroy a ride. Finally, counsel suggested through questions and closing argument that Nadeau's former boyfriend had killed Milroy and that Nadeau was lying to protect her boyfriend. Nadeau flatly denied these suggestions.[4]

In addition to these attempts to discredit Nadeau, Tibbs testified in his own defense. He explained that he was college educated, that he had published a story and a few poems, and that he was hitchhiking through Florida to learn more about how people live. He claimed that he was in Daytona Beach, across the State from Fort Myers, from the evening of February 1, 1974, through the morning of February 6. He also testified that he did not own a green truck, and

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had died that evening from a bullet wound in the head. The other witnesses confirmed that Nadeau and Milroy had been hitchhiking through Fort Myers on February 3 and that Nadeau had arrived at a house, in a hysterical condition, that evening.

A Florida prisoner, sentenced to life imprisonment for rape, also testified for the State. This prisoner claimed that he had met Tibbs while Tibbs was in jail awaiting trial and that Tibbs had confessed the crime to him. The defense substantially discredited this witness on cross-examination, revealing inconsistencies in his testimony and suggesting that he had testified in the hope of obtaining leniency from the State.

[4]The results of two polygraph examinations, described in a report read to the jury, indicated that Nadeau was "truthful as to the fact that a black male driving a green pickup truck had picked them up and that this black male had murdered Terry Milroy," Tr. 302. The polygraphs also suggested that Nadeau was truthful when she identified Tibbs as the assailant. *Id.*, at 303. Tibbs challenged the admissibility of these polygraphs during his first appeal. See *Tibbs* v. *State*, 337 So. 2d 788, 796 (Fla. 1976) (Roberts, J., dissenting). The justices who voted to reverse Tibbs' conviction, however, did not reach the issue and we express no opinion on this matter of state law.

that he had not driven any vehicle while in Florida. Finally, he denied committing any of the crimes charged against him.

Two Salvation Army officers partially corroborated Tibbs' story. These officers produced a card signed by Tibbs, indicating that he had slept at the Daytona Beach Salvation Army Transit Lodge on the evening of February 1, 1974. Neither witness, however, had seen Tibbs after the morning of February 2. Tibbs' other witnesses testified to his good reputation as a law-abiding citizen and to his good reputation for veracity.

On rebuttal, the State produced a card, similar to the one introduced by Tibbs, showing that Tibbs had spent the night of February 4 at the Orlando Salvation Army Transit Lodge. This evidence contradicted Tibbs' claim that he had remained in Daytona Beach until February 6, as well as his sworn statements that he had been in Orlando only once, during the early part of January 1974, and that he had not stayed in any Salvation Army lodge after February 1. After the State presented this rebuttal evidence, Tibbs took the stand to deny both that he had been in Orlando on February 4 and that the signature on the Orlando Salvation Army card was his.

The jury convicted Tibbs of first-degree murder and rape. Pursuant to the jury's recommendation, the judge sentenced Tibbs to death. On appeal, the Florida Supreme Court reversed. *Tibbs* v. *State*, 337 So. 2d 788 (1976) *(Tibbs I)*. A plurality of three justices, while acknowledging that "the resolution of factual issues in a criminal trial is peculiarly within the province of a jury," *id.*, at 791, identified six weaknesses in the State's case.[5] First, except for Nadeau's testimony, the State introduced no evidence placing Tibbs in or near Fort Myers on the day of the crimes. Second, although

[5] The plurality completely discounted the testimony of the convicted rapist who recounted Tibbs' alleged confession. See n. 3, *supra*. This testimony, the justices concluded, appeared "to be the product of purely selfish considerations." 337 So. 2d, at 790.

Nadeau gave a detailed description of the assailant's truck, police never found the vehicle. Third, police discovered neither a gun nor car keys in Tibbs' possession. Fourth, Tibbs cooperated fully with the police when he was stopped and arrested. Fifth, the State introduced no evidence casting doubt on Tibbs' veracity.[6] Tibbs, on the other hand, produced witnesses who attested to his good reputation. Finally, several factors undermined Nadeau's believability. Although she asserted at trial that the crimes occurred during daylight, other evidence suggested that the events occurred after nightfall when reliable identification would have been more difficult. Nadeau, furthermore, had smoked marihuana shortly before the crimes and had identified Tibbs during a suggestive photograph session.[7] These weaknesses left the plurality in "considerable doubt that Delbert Tibbs [was] the man who committed the crimes for which he ha[d] been convicted." *Id.*, at 790. Therefore, the plurality concluded that the "interests of justice" required a new trial. *Ibid.*[8]

Justice Boyd concurred specially, noting that "'[t]he test to be applied in determining the adequacy of a verdict is whether a jury of reasonable men could have returned that verdict.'" *Id.*, at 792 (quoting *Griffis* v. *Hill*, 230 So. 2d 143,

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[6] The plurality opinion summarily dismissed the effect of the rebuttal evidence showing that Tibbs was in Orlando on February 4. A "superficial comparison" of the signature on the Orlando transit card with Tibbs' own signature, the plurality found, supported Tibbs' claim that he had not signed the card. Moreover, evidence that Tibbs was in Orlando on February 4 still did not place him in Fort Myers on February 3. *Id.*, at 790, n. 1.

[7] See n. 2, *supra*.

[8] At the time of Tibbs' first appeal, Florida Appellate Rule 6.16(b) (1962) provided in part:

"Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

The substance of this Rule has been recodified as Florida Appellate Rule 9.140(f).

145 (Fla. 1969)). Apparently applying that standard, Justice Boyd found the State's evidence deficient. He concluded that "the weakness of the evidence presented in the trial court might well require that [Tibbs] be released from incarceration without further litigation," but "reluctantly concur[red]" in the plurality's decision to order a new trial because he understood Florida law to permit retrial. 337 So. 2d, at 792.[9]

On remand, the trial court dismissed the indictment, concluding that retrial would violate the double jeopardy principles articulated in *Burks* v. *United States*, 437 U. S. 1 (1978), and *Greene* v. *Massey*, 437 U. S. 19 (1978).[10] An intermediate appellate court disagreed and remanded the case for trial. 370 So. 2d 386 (Fla. App. 1979). The Florida Supreme Court affirmed the latter decision, carefully elaborating the difference between a reversal stemming from insufficient evidence and one prompted by the weight of the evidence. 397 So. 2d 1120 (1981) *(per curiam) (Tibbs II)*. As the court explained, a conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that

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[9] At two points, Justice Boyd stated that he "concur[red] in the majority opinion." 337 So. 2d, at 792. However, because we are uncertain what weight Florida attaches to special concurrences of this sort and because Justice Boyd's views differed from those of the other justices voting to reverse, we have chosen to designate the lead opinion a "plurality" opinion.

Three justices dissented from the court's disposition of Tibbs' appeal. They declared that "the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded," *id.*, at 796–797, and rejected Tibbs' other assignments of error.

[10] We decided *Burks* and *Greene* after the Florida Supreme Court reversed Tibbs' conviction, but before he could be retried. We have applied *Burks* to prosecutions that were not yet final on the date of that decision. See *Hudson* v. *Louisiana*, 450 U. S. 40 (1981).

a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.*, at 1123.[11]

The Florida Supreme Court then classified *Tibbs I* as a reversal resting on the weight of the evidence. Nadeau's testimony, if believed by the jury, was itself "legally sufficient to support Tibbs' conviction under Florida law." 397 So. 2d, at 1126. In deciding to upset Tibbs' conviction, the court in *Tibbs I* had stressed those "aspects of Nadeau's testimony which cast serious doubt on her believability," 397 So. 2d, at 1126, an approach that bespoke a reweighing of the evidence. "Only by stretching the point . . . ," the court concluded in *Tibbs II*, "could we possibly use an 'insufficiency' analysis to characterize our previous reversal of Tibbs' convictions." *Ibid.*[12]

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[11] Other courts similarly have explained the difference between evidentiary weight and evidentiary sufficiency. In *United States* v. *Lincoln*, 630 F. 2d 1313 (CA8 1980), for example, the court declared:

"The court reviewing the sufficiency of the evidence, whether it be the trial or appellate court, must apply familiar principles. It is required to view the evidence in the light most favorable to the verdict, giving the prosecution the benefit of all inferences reasonably to be drawn in its favor from the evidence. The verdict may be based in whole or in part on circumstantial evidence. The evidence need not exclude every reasonable hypothesis except that of guilt . . . ." *Id.*, at 1316.

"When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different . . . . The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury." *Id.*, at 1319.

See generally 2 C. Wright, Federal Practice and Procedure § 553 (1969).

[12] Elsewhere in its opinion, the Florida Supreme Court ruled that Florida appellate courts no longer may reverse convictions on the ground that the verdict was against the weight of the evidence. 397 So. 2d, at 1125. This ruling does not diminish the importance of the issue before us. Courts in other jurisdictions sometimes rely upon the weight of the evidence to over-

Having found that it could not "fairly conclude . . . that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency," *id.*, at 1127, the Florida Supreme Court held that *Greene* and *Burks* do not bar retrial. Those decisions, the court believed, as well as *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), interpret the Double Jeopardy Clause to preclude retrial after reversal of a conviction only when the appellate court has set the conviction aside on the ground that the evidence was legally insufficient to support conviction. Other reversals, including those based on the weight of the evidence or made in the "interests of justice," do not implicate double jeopardy principles.[13] We granted certiorari to review this interpretation of the Double Jeopardy Clause. 454 U. S. 963 (1981).

II

In 1896, this Court ruled that a criminal defendant who successfully appeals a judgment against him "may be tried anew . . . for the same offence of which he had been con-

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turn convictions. For example, some federal courts have interpreted Rule 33 of the Federal Rules of Criminal Procedure, which authorizes a new trial "if required in the interest of justice," to permit the trial judge to set aside a conviction that is against the weight of the evidence. *E. g.*, *United States* v. *Lincoln*, *supra*, at 1319; *United States* v. *Indelicato*, 611 F. 2d 376, 387 (CA1 1979); *United States* v. *Turner*, 490 F. Supp. 583, 593 (ED Mich. 1979), affirmance order, 633 F. 2d 219 (CA6 1980), cert. denied, 450 U. S. 912 (1981); *United States* v. *Felice*, 481 F. Supp. 79, 90–91 (ND Ohio 1978).

[13] Three justices dissented from the court's decision to permit Tibbs' retrial. Chief Justice Sundberg suggested that the reversal in *Tibbs I* must have rested upon a finding of evidentiary insufficiency, because the Florida Supreme Court lacked authority to reweigh the evidence. He also rejected the majority's distinction between evidentiary weight and evidentiary sufficiency, proposing that the Double Jeopardy Clause should bar retrial whenever an appellate court reverses "for a substantive lack of evidence to support the verdict." 397 So. 2d, at 1128. Justice England merely stated that he would discharge Tibbs "in the interest of justice." *Id.*, at 1130. Justice Boyd concluded that *Tibbs I* had rested on a finding of evidentiary insufficiency and, accordingly, that Tibbs "should be forever discharged from the accusations made against him." 397 So. 2d, at 1131.

victed." *United States* v. *Ball*, 163 U. S. 662, 672. This principle, that the Double Jeopardy Clause "imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside," *North Carolina* v. *Pearce*, 395 U. S. 711, 720 (1969), has persevered to the present. See *United States* v. *DiFrancesco*, *supra*, at 131; *United States* v. *Scott*, 437 U. S. 82, 89–92 (1978). Two considerations support the rule. First, the Court has recognized that society would pay too high a price "were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). Second, the Court has concluded that retrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause. *United States* v. *Scott*, *supra*, at 91. See generally *United States* v. *DiFrancesco*, *supra*, at 131.[14]

Burks v. *United States* and *Greene* v. *Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evi-

[14] The rule also appears to coincide with the intent of the Fifth Amendment's drafters. James Madison's proposed version of the Double Jeopardy Clause provided that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 434 (1789). Several Representatives objected that this language might prevent a defendant from seeking a new trial after conviction. Representative Sherman, for example, observed that "[i]f the [defendant] was acquitted on the first trial, he ought not to be tried a second time; but if he was convicted on the first, and any thing should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him." *Id.*, at 753. Madison's supporters explained that the language would not prevent a convicted defendant from seeking a new trial, and the House approved Madison's proposal. *Ibid.* The Senate later substituted the language appearing in the present Clause. S. Jour., 1st Cong., 1st Sess., 71, 77 (1820 ed.). See generally *United States* v. *Wilson*, 420 U. S. 332, 340–342 (1975); Sigler, A History of Double Jeopardy, 7 Am. J. Legal Hist. 283, 304–306 (1963).

dence legally insufficient" to support conviction. *Burks*, 437 U. S., at 18; *Greene*, 437 U. S., at 24. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks*, 437 U. S., at 16 (emphasis in original). A conviction will survive review, we suggested, whenever "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt." *Ibid.* See also *Greene*, *supra*, at 25. In sum, we noted that the rule barring retrial would be "confined to cases where the prosecution's failure is clear." *Burks*, *supra*, at 17.

So defined, the exception recognized in *Burks* and *Greene* rests upon two closely related policies. First, the Double Jeopardy Clause attaches special weight to judgments of acquittal.[15] A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.[16] A reversal based on the insufficiency of the evidence has the same effect because it means that no rational factfinder could have voted to convict the defendant.

Second, *Burks* and *Greene* implement the principle that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks*, *supra*, at 11. This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.

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[15] See *United States* v. *DiFrancesco*, 449 U. S. 117, 129 (1980); *United States* v. *Scott*, 437 U. S. 82, 91 (1978); *Arizona* v. *Washington*, 434 U. S. 497, 503 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977); *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962) *(per curiam)*.

[16] See, *e. g.*, *United States* v. *Martin Linen Supply Co.*, *supra*; *United States* v. *Ball*, 163 U. S. 662, 666–671 (1896).

See *Green* v. *United States*, 355 U. S. 184, 187–188 (1957); *United States* v. *DiFrancesco*, 449 U. S., at 130. For this reason, when a reversal rests upon the ground that the prosecution has failed to produce sufficient evidence to prove its case, the Double Jeopardy Clause bars the prosecutor from making a second attempt at conviction.

As we suggested just last Term, these policies do not have the same force when a judge disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence. See *Hudson* v. *Louisiana*, 450 U. S. 40, 44–45, n. 5 (1981). A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves. A deadlocked jury, we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause.[17] Similarly, an appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal.

A reversal based on the weight of the evidence, moreover, can occur only after the State both has presented sufficient

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[17] See, *e. g.*, *Arizona* v. *Washington*, *supra*, at 509; *United States* v. *Sanford*, 429 U. S. 14, 16 (1976) *(per curiam)*; *Johnson* v. *Louisiana*, 406 U. S. 356, 401–402 (1972) (MARSHALL, J., dissenting); *Downum* v. *United States*, 372 U. S. 734, 735–736 (1963); *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949); *Keerl* v. *Montana*, 213 U. S. 135 (1909); *Dreyer* v. *Illinois*, 187 U. S. 71, 84–86 (1902); *Logan* v. *United States*, 144 U. S. 263, 298 (1892); *United States* v. *Perez*, 9 Wheat. 579 (1824).

Our decisions also make clear that disagreements among jurors or judges do not themselves create a reasonable doubt of guilt. As JUSTICE WHITE, writing for the Court in *Johnson* v. *Louisiana*, *supra*, explained, "[t]hat rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard." 406 U. S., at 362.

evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek a favorable judgment.[18] An appellate court's decision to give the defendant this second chance does not create "an unacceptably high risk that the Government, with its superior resources, [will] wear down [the] defendant" and obtain conviction solely through its persistence. *United States* v. *DiFrancesco*, *supra*, at 130.[19]

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[18] The dissent suggests that a reversal based on the weight of the evidence necessarily requires the prosecution to introduce new evidence on retrial. Once an appellate court rules that a conviction is against the weight of the evidence, the dissent reasons, it must reverse any subsequent conviction resting upon the same evidence. We do not believe, however, that jurisdictions endorsing the "weight of the evidence" standard apply that standard equally to successive convictions. In Florida, for example, the highest state court once observed that, although "[t]here is in this State no limit to the number of new trials that may be granted in any case, . . . it takes a strong case to require an appellate court to grant a new trial in a case upon the ground of insufficiency of conflicting evidence to support a verdict when the finding has been made by two juries." *Blocker* v. *State*, 92 Fla. 878, 893, 110 So. 547, 552 (1926) (en banc). The weight of the evidence rule, moreover, often derives from a mandate to act in the interests of justice. See nn. 8 and 12, *supra*. Although reversal of a first conviction based on sharply conflicting testimony may serve the interests of justice, reversal of a second conviction based on the same evidence may not. See *United States* v. *Weinstein*, 452 F. 2d 704, 714, n. 14 (CA2 1971) ("We do not join in the . . . forecast that the granting of a new trial would doom the defendant and the Government to an infinite regression. . . . [I]f a third jury were to find [the defendant] guilty, we should suppose any judge would hesitate a long time before concluding that the interests of justice required still another trial"), cert. denied *sub nom. Grunberger* v. *United States*, 406 U. S. 917 (1972). While the interests of justice may require an appellate court to sit once as a thirteenth juror, that standard does not compel the court to repeat the role.

[19] A second chance for the defendant, of course, inevitably affords the prosecutor a second try as well. It is possible that new evidence or advance understanding of the defendant's trial strategy will make the State's case even stronger during a second trial than it was at the first. It is also possible, however, that the passage of time and experience of defense counsel will weaken the prosecutor's presentation. In this case, for example, more than eight years have elapsed since the crimes. Nadeau's ability

While an appellate ruling based on the weight of the evidence thus fails to implicate the policies supporting *Burks* and *Greene*, it does involve the usual principles permitting retrial after a defendant's successful appeal. Just as the Double Jeopardy Clause does not require society to pay the high price of freeing every defendant whose first trial was tainted by prosecutorial error, it should not exact the price of immunity for every defendant who persuades an appellate panel to overturn an error-free conviction and give him a second chance at acquittal. Giving the defendant this second opportunity, when the evidence is sufficient to support the first verdict, hardly amounts to "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States* v. *Scott*, 437 U. S., at 91.

Petitioner Tibbs resists these arguments on the grounds that a distinction between the weight and the sufficiency of the evidence is unworkable and that such a distinction will undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence. We find these arguments unpersuasive for two reasons. First, trial and appellate judges commonly distinguish between the weight and the sufficiency of the evidence.[20] We have no reason to believe that today's decision

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to recall the events of February 3, 1974, may have diminished significantly, and a jury may be less willing to credit her identification of a man she saw almost a decade ago. When the State has secured one conviction based on legally sufficient evidence, it has everything to lose and little to gain by retrial. Thus, the type of "second chance" that the State receives when a court rests reversal on evidentiary weight does not involve the overreaching prohibited by the Double Jeopardy Clause.

[20] See, *e. g.*, *United States* v. *Lincoln*, 630 F. 2d, at 1319; *United States* v. *Weinstein*, *supra*, at 714–716; *United States* v. *Shipp*, 409 F. 2d 33, 36–37 (CA4), cert. denied, 396 U. S. 864 (1969); *Dorman* v. *State*, 622 P. 2d 448, 453–454 (Alaska 1981); *Ridley* v. *State*, 236 Ga. 147, 149, 223 S. E. 2d 131, 132 (1976); *State* v. *McGranahan*, —— R. I. ——, ——–——, 415 A. 2d 1298, 1301–1303 (1980); *Tyacke* v. *State*, 65 Wis. 2d 513, 521, 223 N. W. 2d 595, 599 (1974).

will erode the demonstrated ability of judges to distinguish legally insufficient evidence from evidence that rationally supports a verdict.

Second, our decision in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), places some restraints on the power of appellate courts to mask reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence. We held in *Jackson* that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt. The Due Process Clause, in other words, sets a lower limit on an appellate court's definition of evidentiary sufficiency.[21] This limit, together with our belief that state appellate judges faithfully honor their obligations to enforce applicable state and federal laws, persuades us that today's ruling will not undermine *Burks*. In sum, we conclude that the Double Jeopardy Clause does not prevent an appellate court from granting a convicted defendant an opportunity to seek acquittal through a new trial.[22]

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[21] The evidence in this case clearly satisfied the due process test of *Jackson* v. *Virginia*. As we stressed in *Jackson*, the reviewing court must view "the evidence in the light most favorable to the prosecution." 443 U. S., at 319. The trier of fact, not the appellate court, holds "the responsibility . . . fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Ibid.* In this case, Nadeau provided eyewitness testimony to the crimes. If the jury believed her story, the State's presentation was more than sufficient to satisfy due process.

[22] We note that a contrary rule, one precluding retrial whenever an appellate court rests reversal on evidentiary weight, might prompt state legislatures simply to forbid those courts to reweigh the evidence. Rulemakers willing to permit a new trial in the face of a verdict supported by legally sufficient evidence may be less willing to free completely a defendant convicted by a jury of his peers. Acceptance of Tibbs' double jeopardy theory might also lead to restrictions on the authority of trial judges to order new trials based on their independent assessment of evidentiary weight. Although Tibbs limits his argument to appellate reversals, his contentions logically apply to a trial judge's finding that a conviction was against the

III

We turn, finally, to apply the above principles to the present case. A close reading of *Tibbs I* suggests that the Florida Supreme Court overturned Tibbs' conviction because the evidence, although sufficient to support the jury's verdict, did not fully persuade the court of Tibbs' guilt. The plurality based its review on a Florida rule directing the court in capital cases to "review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not." See n. 8, *supra*. References to the "interests of justice" and the justices' own "considerable doubt" of Tibbs' guilt mark the plurality's conclusions.[23] Those conclusions, moreover, stem from the justices' determination that Tibbs' testimony was more reliable than that of Nadeau. This resolution of conflicting testimony in a manner contrary to the jury's verdict is a hallmark of review based on evidentiary weight, not evidentiary sufficiency.

Any ambiguity in *Tibbs I*, finally, was resolved by the Florida Supreme Court in *Tibbs II*. Absent a conflict with the Due Process Clause, see n. 21, *supra*, that court's con-

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weight of the evidence. Cf. *Hudson* v. *Louisiana*, 450 U. S. 40 (1981) (applying *Burks* v. *United States*, 437 U. S. 1 (1978), to trial judge's postverdict ruling that evidence was insufficient to support conviction). Endorsement of Tibbs' theory, therefore, might only serve to eliminate practices that help shield defendants from unjust convictions.

[23] At one point, the opinion does refer to " 'evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt.' " 337 So. 2d, at 791 (quoting *McNeil* v. *State*, 104 Fla. 360, 361–362, 139 So. 791, 792 (1932)). This reference, however, occurs in a lengthy quotation from an earlier Florida decision. When read in context, it does not appear that the plurality actually applied this standard to the evidence in Tibbs' case. Moreover, the quotation containing this sufficiency language also speaks of evidence that is "not satisfactory" to the appellate court and that is not "substantial in character." *Ibid.* This language, in line with the remainder of *Tibbs I*, evidences a weighing of the evidence.

struction of its prior opinion binds this Court.[24] In *Tibbs II*, of course, the court unequivocally held that *Tibbs I* was "one of those rare instances in which reversal was based on evidentiary weight." 397 So. 2d, at 1126 *(per curiam)*. Thus, we conclude that Tibbs' successful appeal of his conviction rested upon a finding that the conviction was against the weight of the evidence, not upon a holding that the evidence was legally insufficient to support the verdict. Under these circumstances, the Double Jeopardy Clause does not bar retrial. Accordingly, the judgment of the Florida Supreme Court is

Affirmed.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

As our cases in this area indicate, the meaning of the Double Jeopardy Clause is not always readily apparent. See, *e. g.*, *Burks* v. *United States*, 437 U. S. 1 (1978) (overruling *Bryan* v. *United States*, 338 U. S. 552 (1950), *Sapir* v. *United States*, 348 U. S. 373 (1955), and *Forman* v. *United States*, 361 U. S. 416 (1960)); *United States* v. *Scott*, 437 U. S. 82 (1978) (overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975)). For this reason, we should begin with a clear understanding of what is at stake in this case.

To sustain the convictions in this case, the prosecution was required to convince the Florida Supreme Court not only that the evidence was sufficient under the federal constitutional

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[24] In *Greene* v. *Massey*, 437 U. S. 19 (1978), we recognized that the meaning attached to an ambiguous prior reversal is a matter of state law. In that case, we remanded a double jeopardy issue to the Court of Appeals for the Fifth Circuit, directing the court to consider the effect under state law of several peculiarities in the state court's opinion. *Id.*, at 25–26, and nn. 8–10. We even suggested that the Court of Appeals might "direct further proceedings in the District Court or . . . certify unresolved questions . . . to the Florida Supreme Court" to resolve these problems of state law. *Id.*, at 27.

standard announced in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), but also that as a matter of state law, the verdict was not against the weight of the evidence. The Florida Supreme Court found the verdict to be against the weight of the evidence, thus holding that as a matter of state law the prosecution failed to present evidence adequate to sustain the convictions. Were the State to present this same evidence again, we must assume that once again the state courts would reverse any conviction that was based upon it.* The State was not prevented from presenting its best case because of some incorrect procedural ruling by the trial court; rather, the State had a full opportunity to present its case, but that case was not adequate as a matter of state law. If the State presents no new evidence, the defendant has no new or additional burden to meet in successfully presenting a defense: He may stand on, *i. e.*, repeat, what he has already presented. Thus, the only point of any second trial in this case is to allow the State to present additional evidence to bolster its case. If it does not have such evidence, reprosecution can serve no purpose other than harassment. The majority holds that reprosecution under these circumstances does not offend the double jeopardy provision of the Constitution. I do not agree.

The majority concedes, as it must under *Burks*, *supra*, that if the State's evidence failed to meet the federal due

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*Only Chief Justice Sundberg, concurring in part and dissenting in part, reached this issue below: "Since the same evidence must be used, an appellate court would have no choice but once again to reverse a conviction because of our reversal under identical circumstances." 397 So. 2d 1120, 1130 (1981). Because the majority concluded that it would not in the future reverse convictions on grounds of evidentiary weight, it is not clear whether that court, were it presented with the exact same evidence in a *Tibbs III*, would follow its new rule and affirm or again reverse on "law of the case" grounds. I agree with the majority, however, that the peculiar procedural posture of this case does not affect our consideration of the issue because other jurisdictions, including the Federal Government, make use of a similar rule with respect to evidentiary weight.

process standard of evidentiary sufficiency, the Double Jeopardy Clause would bar reprosecution. The majority fails to explain why the State should be allowed another try where its proof has been held inadequate on state-law grounds, when it could not do so were it inadequate on federal-law grounds. In both cases the State has failed to present evidence adequate to sustain the conviction. The interests of the State in overcoming the evidentiary insufficiencies of its case would seem to be exactly the same in the two cases; the interests of the defendant in avoiding a second trial would also seem to be exactly the same in each case. Yet the majority holds that the Double Jeopardy Clause leads to different results in the two instances.

The majority offers two arguments in its attempt to distinguish the two cases. First, it emphasizes that the Double Jeopardy Clause "attaches special weight to judgments of acquittal." But in neither of the situations posited has there been a judgment of acquittal by the initial factfinder. In each instance, a reviewing court decides that, as a matter of law, the decision of the factfinder cannot stand. Second, the majority thinks it to be of some significance that when the evidence is determined to be insufficient as a matter of federal law, then no rational factfinder could have voted to convict on that basis. On the other hand, when the conviction is reversed on the basis of the state-law rule applying a "weight of the evidence" test, that "does not mean that acquittal was the only proper verdict." *Ante*, at 42. The constraints of the Double Jeopardy Clause, however, do not depend upon a determination that an "acquittal was the only proper verdict." The fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law.

The majority opinion rests finally on a mischaracterization of the appellate court's ruling: "The reversal simply affords the defendant a second opportunity to seek a favorable judgment." *Ante*, at 43. But as I described above, it is not

the defendant who has the burden of coming up with a new case on retrial; it is the prosecution. The defendant has already demonstrated that a conviction based on the State's case, as so far developed, is "against the weight of the evidence."

Having concluded that the majority opinion fails to justify the distinction it draws, I too turn to "the policies supporting the Double Jeopardy Clause," *ante*, at 32, to determine whether this distinction is relevant. I do not believe it necessary to look beyond the articulation of those policies in the majority opinion itself to conclude that it is not:

> "*Burks* and *Greene* [v. *Massey*, 437 U. S. 19 (1978)] implement the principle that '[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Ante*, at 41 (citations omitted).

These same policy considerations are at stake when a conviction is reversed on state-law grounds going to the adequacy of the evidence. The relevant question is whether the reversal is "'due to a failure of proof at trial' where the State received a 'fair opportunity to offer whatever proof it could assemble.'" *Hudson* v. *Louisiana*, 450 U. S. 40, 43 (1981) (quoting *Burks*, 437 U. S., at 16). That the proof fails on state-law, rather than federal-law, grounds is immaterial to these policy considerations. Thus, the relevant distinction is between reversals based on evidentiary grounds and those based on procedural grounds: Only in the latter case can the State proceed to retrial without offending the deeply in-

grained principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Green* v. *United States*, 355 U. S. 184, 187 (1957).

It must also be noted that judges having doubts about the sufficiency of the evidence under the *Jackson* standard may prefer to reverse on the weight of the evidence, since retrial would not be barred. If done recurringly, this would undermine *Jackson*, *Burks*, and *Greene*. But under *Burks* and *Greene*, retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the *Jackson* standard. Hence, the *Jackson* issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict. That finding must accompany any reversal based on the weight of the evidence if retrial is contemplated. The upshot may be that appellate judges will not be inclined to proclaim the evidence in a case to be legally sufficient, yet go on to disagree with the jury and the trial court by reversing on weight-of-the-evidence grounds. Indeed, in this case, the Florida Supreme Court declared that prospect to be an anomaly and a mistake and proclaimed that it would never again put itself in this position.

With all due respect, I dissent.

JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 81–1097. Decided June 7, 1982

The Court of Appeals' original judgment upholding, over petitioners' constitutional challenge, respondent Board of Education's racial quota plan for high schools, was vacated by this Court, and the case was remanded for further consideration in light of a subsequent decree in a related case. On remand from the Court of Appeals, the District Court held without taking further evidence that the challenge was not rendered moot by the decree, and the Court of Appeals affirmed.

Held: Although the case is not moot and the subsequent development did not undermine the Court of Appeals' original judgment, that development might be relevant to petitioners' challenge, and accordingly the Court of Appeals' later judgment is vacated with the direction to consolidate the matter with the related case so that the District Court may decide petitioners' challenge on the basis of a complete factual record.

Certiorari granted; 664 F. 2d 1069, vacated and remanded.

PER CURIAM.

This case was commenced by petitioners challenging the voluntary adoption by the Board of Education of the city of Chicago of racial quotas on enrollment at two high schools. Petitioners alleged that the quotas, purportedly designed to arrest "white flight," were unlawful because they resulted in the denial of admission to those schools of some black applicants but no white applicants. The District Court upheld the plan, and the Court of Appeals affirmed. 604 F. 2d 504 (CA7 1979). We granted certiorari, 448 U. S. 910 (1980), but then vacated the judgment and remanded the case "for further consideration in light of the subsequent development described in the suggestion of mootness filed by respondents." 449 U. S. 915 (1980). That development was the entry of a consent decree in a related case, *United States* v.

Board of Education of Chicago, No. 80–C–5124 (ND Ill.), in which the Board of Education agreed to develop a systemwide integration plan, and the Board's announcement that it had abandoned use of the racial quotas at the two high schools. The Court of Appeals remanded to the District Court to consider the suggestion of mootness. 645 F. 2d 75 (1981). That court, finding that the Board had readopted the quotas, concluded without taking further evidence that the challenge was not moot. The Court of Appeals, agreeing that the case was not moot and relying upon the doctrine of the law of the case, affirmed without reconsidering the constitutional challenge to the racial quotas in light of the subsequent development that the Board argued eliminated or reduced any discriminatory effects of the quotas. 664 F. 2d 1069 (1981). Petitioners have now renewed their request for review.

We agree with the Court of Appeals that the case is not moot and that the subsequent development does not undermine that court's original decision upholding the racial quotas. However, since if we were to grant certiorari we would consider the constitutional challenge as an original matter, the subsequent development might well be relevant to that consideration. It was for that reason that we vacated the Court of Appeals' judgment for further consideration in light of the subsequent development. No additional evidence was taken and therefore neither the record nor the District Court or Court of Appeals opinions reflect the subsequent development. We therefore grant certiorari, vacate the judgment, and remand the case with the direction that the matter be consolidated with the ongoing proceeding in the District Court in *United States* v. *Board of Education of Chicago*, No. 80–C–5124, so that court may decide petitioners' challenge on the basis of a complete factual record. Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either

the District Court or, should an appeal subsequently be taken, the Court of Appeals.

It is so ordered.

JUSTICE BRENNAN would grant the petition for a writ of certiorari and set the case for oral argument.

JUSTICE WHITE took no part in the consideration or decision of this case.

JUSTICE REHNQUIST, with whom JUSTICE MARSHALL joins, dissenting.

Title 28 U. S. C. §2106 provides that "[t]he Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . ." Our practice over many years indicates that implicit in this grant of authority is a requirement that we specify our reasons for acting as we do. Here the Court departs from that implicit requirement. The ultimate disposition of the case is the vacation of the judgment of the Court of Appeals and a remand so that this case may be consolidated with another proceeding in the District Court for the Northern District of Illinois. A reading of the Court's *per curiam* suggests that the Court is vaguely dissatisfied with the opinion of the Court of Appeals which it purportedly reviews, but no substantive judgment is made as to whether that opinion was correct or incorrect in whole or in part. Nothing in the record before us suggests to me any reason why we should assume a function more properly exercised by the Court of Appeals or by the District Court, and order consolidation of this case with another pending action in the District Court. But even if I were disposed to agree as to the propriety of the disposition now made by the Court, I would hope that something in the nature of an opinion explaining the reasons for the action would accompany the disposition. Since the Court's *per curiam* makes no effort at such an explanation, I dissent.

ZOBEL ET UX. v. WILLIAMS, COMMISSIONER OF REVENUE OF ALASKA, ET AL.

APPEAL FROM THE SUPREME COURT OF ALASKA

No. 80–1146. Argued October 7, 1981—Decided June 14, 1982

After Alaska amended its Constitution to establish a Permanent Fund into which the State must deposit at least 25% of its mineral income each year, the state legislature in 1980 enacted a dividend program to distribute annually a portion of the Fund's earnings directly to the State's adult residents. Under the plan, each adult resident receives one dividend unit for each year of residency subsequent to 1959, the first year of Alaska's statehood. Appellants, residents of Alaska since 1978, brought an action in an Alaska state court challenging the statutory dividend distribution plan as violative of, *inter alia*, their right to equal protection guarantees. The trial court granted summary judgment in appellants' favor, but the Alaska Supreme Court reversed and upheld the statute.

Held: The Alaska dividend distribution plan violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment. Pp. 58–65.

(a) Rather than imposing any threshold waiting period for entitlement to dividend benefits or establishing a test of bona fides of state residence, the dividend statute creates fixed, permanent distinctions between an ever-increasing number of classes of concededly bona fide residents based on how long they have lived in the State. *Sosna* v. *Iowa*, 419 U. S. 393; *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250; *Dunn* v. *Blumstein*, 405 U. S. 330; and *Shapiro* v. *Thompson*, 394 U. S. 618, distinguished. When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause, and generally a law will survive that scrutiny if the distinctions rationally further a legitimate state purpose. Pp. 58–61.

(b) Alaska has shown no valid state interests that are rationally served by the distinctions it makes between citizens who established residence before 1959 and those who have become residents since then. Neither the State's claimed interest in creating a financial incentive for individuals to establish and maintain residence in Alaska nor its claimed interest in assuring prudent management of the Permanent Fund is rationally related to such distinctions. And the State's interest in rewarding citizens for past contributions is not a legitimate state purpose. Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency, and would

permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible. Pp. 61–64.

619 P. 2d 448, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, BLACKMUN, and POWELL, JJ., joined, *post*, p. 65. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 71. REHNQUIST, J., filed a dissenting opinion, *post*, p. 81.

Mark A. Sandberg argued the cause for appellants. With him on the briefs was *Jonathon B. Chase.*

Avrum M. Gross argued the cause for appellees. With him on the brief were *Wilson L. Condon*, Attorney General of Alaska, and *Susan A. Burke*, Assistant Attorney General.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal is whether a statutory scheme by which a State distributes income derived from its natural resources to the adult citizens of the State in varying amounts, based on the length of each citizen's residence, violates the equal protection rights of newer state citizens. The Alaska Supreme Court sustained the constitutionality of the statute. 619 P. 2d 448 (1980). We stayed the distribution of dividend funds, 449 U. S. 989 (1980), and noted probable jurisdiction, 450 U. S. 908 (1981). We reverse.

I

The 1967 discovery of large oil reserves on state-owned land in the Prudhoe Bay area of Alaska resulted in a windfall to the State. The State, which had a total budget of $124 million in 1969, before the oil revenues began to flow into the state coffers, received $3.7 billion in petroleum revenues during the 1981 fiscal year.[1] This income will continue, and

[1] Alaska Dept. of Revenue, Revenue Sources FY 1981–1983 (Sept. 1981). (Includes General Fund unrestricted petroleum revenues of $3.3 billion

most likely grow for some years in the future. Recognizing that its mineral reserves, although large, are finite and that the resulting income will not continue in perpetuity, the State took steps to assure that its current good fortune will bring long-range benefits. To accomplish this, Alaska in 1976 adopted a constitutional amendment establishing the Permanent Fund into which the State must deposit at least 25% of its mineral income each year. Alaska Const., Art. IX, § 15. The amendment prohibits the legislature from appropriating any of the principal of the Fund but permits use of the Fund's earnings for general governmental purposes.

In 1980, the legislature enacted a dividend program to distribute annually a portion of the Fund's earnings directly to the State's adult residents. Under the plan, each citizen 18 years of age or older receives one dividend unit for each year of residency subsequent to 1959, the first year of statehood. The statute fixed the value of each dividend unit at $50 for the 1979 fiscal year; a one-year resident thus would receive one unit, or $50, while a resident of Alaska since it became a State in 1959 would receive 21 units, or $1,050. The value of a dividend unit will vary each year depending on the income of the Permanent Fund and the amount of that income the State allocates for other purposes. The State now estimates that the 1985 fiscal year dividend will be nearly four times as large as that for 1979.

Appellants, residents of Alaska since 1978, brought this suit in 1980 challenging the dividend distribution plan as violative of their right to equal protection guarantees and their constitutional right to migrate to Alaska, to establish residency there and thereafter to enjoy the full rights of Alaska

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and petroleum revenues directly deposited in the Permanent Fund in the amount of $400 million. An additional $900 million was transferred from the General Fund to the Permanent Fund in the 1981 fiscal year.) The 1980 census reports that Alaska's adult population is 270,265; per capita 1981 oil revenues amount to $13,632 for each adult resident. Petroleum revenues now amount to 89% of the State's total government revenue. *Ibid.*

citizenship on the same terms as all other citizens of the State. The Superior Court for Alaska's Third Judicial District granted summary judgment in appellants' favor, holding that the plan violated the rights of interstate travel and equal protection. A divided Alaska Supreme Court reversed and upheld the statute.[2]

II

The Alaska dividend distribution law is quite unlike the durational residency requirements we examined in *Sosna* v. *Iowa*, 419 U. S. 393 (1975); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); and *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). Those cases involved laws which required new residents to reside in the State a fixed minimum period to be eligible for certain benefits available on an equal basis to all other residents.[3] The asserted purpose of the durational residency requirements was to assure that only persons who had established bona fide residence received rights and benefits provided for residents.

The Alaska statute does not impose any threshold waiting period on those seeking dividend benefits; persons with less

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[2] The infusion of Permanent Fund earnings into state general revenues also led the Alaska Legislature to enact a statute giving residents a one-third exemption from state income taxes for each year of residence; this operated to exempt entirely anyone with three or more years of residency. The Alaska Supreme Court, again by a 3–2 vote, held that this statute violated the State Constitution's equal protection clause. *Williams* v. *Zobel*, 619 P. 2d 422 (1980). Chief Justice Rabinowitz, the only justice in the majority in both cases, found that the tax exemption statute, but not the dividend distribution plan, could "be perceived as a penalty imposed on a person who chooses to exercise his or her right to move into Alaska." 619 P. 2d, at 458.

[3] In the durational residency cases, we examined state laws which imposed waiting periods on access to divorce courts, *Sosna* v. *Iowa;* eligibility for free nonemergency medical care, *Memorial Hospital* v. *Maricopa County;* voting rights, *Dunn* v. *Blumstein;* and welfare assistance, *Shapiro* v. *Thompson.*

than a full year of residency are entitled to share in the distribution. Alaska Stat. Ann. § 43.23.010 (Supp. 1981).[4] Nor does the statute purport to establish a test of the bona fides of state residence. Instead, the dividend statute creates fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State.

Appellants established residence in Alaska two years before the dividend law was passed. The distinction they complain of is not one which the State makes between those who arrived in Alaska after the enactment of the dividend distribution law and those who were residents prior to its enactment. Appellants instead challenge the distinctions made within the class of persons who were residents when the dividend scheme was enacted in 1980. The distinctions appellants attack include the preference given to persons who were residents when Alaska became a State in 1959 over all those who have arrived since then, as well as the distinctions made between all bona fide residents who settled in Alaska at different times during the 1959 to 1980 period.[5]

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[4] Section 43.23.010(b) provides:

"For each year, an individual is eligible to receive payment of the permanent fund dividends for which he is entitled under this section if he

"(1) is at least 18 years of age; and

"(2) is a state resident during all or part of the year for which the permanent fund dividend is paid."

The remainder of § 43.23.010 establishes the number of dividend units residents are entitled to receive and the method of payment. Section 43.23.010(f) provides that a resident entitled to benefits under subsection (b) who was a resident for less than a full year is entitled to a dividend prorated on the basis of the number of months of state residence.

[5] The Alaska statute does not simply make distinctions between native-born Alaskans and those who migrate to Alaska from other states; it does not discriminate only against those who have recently exercised the right to travel, as did the statute involved in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). The Alaska statute also discriminates among long-time residents and even native-born residents. For example, a person born in Alaska in 1962 would have received $100 less than someone who was born

When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[6] Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose. Some particularly invidious distinctions are subject to more rigorous scrutiny. Appellants claim that the distinctions made by the Alaska law should be subjected to the higher level of scrutiny applied to the durational residency requirements in *Shapiro* v. *Thompson*, *supra*, and *Memorial Hospital* v. *Maricopa County*, *supra*. The State, on the other hand, asserts that the law need only meet the minimum rationality test. In any event, if the statutory scheme cannot pass even the minimal

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in the State in 1960. Of course the native Alaskan born in 1962 would also receive $100 less than the person who moved to the State in 1960.

The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. That Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer* v. *Witsell*, 334 U. S. 385, 395 (1948). The Clause is thus not applicable to this case.

[6]The Alaska courts considered whether the dividend distribution law violated appellants' constitutional right to travel. The right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right have remained obscure. See *Jones* v. *Helms*, 452 U. S. 412, 417–419, and nn. 12 and 13 (1981); *Shapiro* v. *Thompson*, *supra*, at 629–631; *United States* v. *Guest*, 383 U. S. 745, 757–759 (1966). See also Z. Chafee, Three Human Rights in the Constitution of 1787, pp. 188–193 (1956). In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents. See *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Shapiro* v. *Thompson*, *supra*. This case also involves distinctions between residents based on when they arrived in the State and is therefore also subject to equal protection analysis.

test proposed by the State, we need not decide whether any enhanced scrutiny is called for.

A

The State advanced and the Alaska Supreme Court accepted three purposes justifying the distinctions made by the dividend program: (a) creation of a financial incentive for individuals to establish and maintain residence in Alaska; (b) encouragement of prudent management of the Permanent Fund; and (c) apportionment of benefits in recognition of undefined "contributions of various kinds, both tangible and intangible, which residents have made during their years of residency," 619 P. 2d, at 458.[7]

As the Alaska Supreme Court apparently realized, the first two state objectives—creating a financial incentive for individuals to establish and maintain Alaska residence, and assuring prudent management of the Permanent Fund and the State's natural and mineral resources—are not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959.[8]

[7] These purposes were enumerated in the first section of the Act creating the dividend distribution plan, 1980 Alaska Sess. Laws, ch. 21, § 1(b):

"(b) The purposes of this Act are

"(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

"(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

"(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution)."

Thus we need not speculate as to the objectives of the legislature.

[8] In response to the argument that the objectives of stabilizing population and encouraging prudent management of the Permanent Fund and of the State's natural resources did not justify the application of the dividend program to the years 1959 to 1980, the Alaska Supreme Court maintained that the retrospective aspect of the program was justified by the objective of rewarding state citizens for past contributions. 619 P. 2d, at 461–462, n. 37. See also dissenting opinion of Justice Dimond, *id.*, at 469–471.

Assuming, *arguendo*, that granting increased dividend benefits for each year of continued Alaska residence might give some residents an incentive to stay in the State in order to reap increased dividend benefits in the future, the State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment.[9]

Nor does the State's purpose of furthering the prudent management of the Permanent Fund and the State's resources support retrospective application of its plan to the date of statehood. On this score the State's contention is straightforward:

> "[A]s population increases, each individual share in the income stream is diluted. The income must be divided equally among increasingly large numbers of people. If residents believed that twenty years from now they would be required to share permanent fund income on a per capita basis with the large population that Alaska will no doubt have by then, the temptation would be great to urge the legislature to provide immediately for the highest possible percentage return on the investments of the permanent fund principal, which would require investments in riskier ventures." *Id.*, at 462.

The State similarly argues that equal per capita distribution would encourage rapacious development of natural re-

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[9] In fact, newcomers seem more likely to become dissatisfied and to leave the State than well-established residents; it would thus seem that the State would give a larger, rather than a smaller, dividend to new residents if it wanted to discourage emigration. The separation of residents into classes hardly seems a likely way to persuade new Alaskans that the State welcomes them and wants them to stay.

Of course, the State's objective of reducing population turnover cannot be interpreted as an attempt to inhibit migration into the State without encountering insurmountable constitutional difficulties. See *Shapiro* v. *Thompson*, 394 U. S., at 629.

sources. *Ibid.* Even if we assume that the state interest is served by increasing the dividend for each year of residency beginning with the date of enactment, is it rationally served by granting greater dividends in varying amounts to those who resided in Alaska during the 21 years prior to enactment? We think not.

The last of the State's objectives—to reward citizens for past contributions—alone was relied upon by the Alaska Supreme Court to support the retrospective application of the law to 1959. However, that objective is not a legitimate state purpose. A similar "past contributions" argument was made and rejected in *Shapiro* v. *Thompson*, 394 U. S., at 632–633:

> "Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contributions they have made to the community through the payment of taxes. . . . Appellants' reasoning would . . . permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens. *The Equal Protection Clause prohibits such an apportionment of state services.*" (Emphasis added.)

Similarly, in *Vlandis* v. *Kline*, 412 U. S. 441 (1973), we noted that "apportion[ment of] tuition rates on the basis of old and new residency . . . would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment." *Id.*, at 449–450, and n. 6.[10]

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[10] Even if the objective of rewarding past contributions were valid, it would be ironic to apply that rationale here. As Representative Randolph noted during debate in the state legislature on the dividend statute:

"The pipeline is the entity that has allowed us all this latitude to do all the things we're considering doing, not only today but throughout the session. And without . . . newcomers, we couldn't have built that pipeline. Without their skill, without their ability, without their money, the pipeline wouldn't be there. So I get a little bit tired of—and I've got a hunch an

If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency.[11] It would permit the states to divide citizens into expanding numbers of permanent classes.[12] Such a result would be clearly impermissible.[13]

B

We need not consider whether the State could enact the dividend program prospectively only. Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion. *Buckley* v.

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awful lot of people who have been here five or six or seven or ten years, whatever we knock off as newcomers, get a little bit tired of being chastized and penalized and discriminated against for having not been born here or not have been here 30 or 40 or 50 years."

[11] Apportionment would thus be prohibited only when it involves "fundamental rights" and services deemed to involve "basic necessities of life." See *Memorial Hospital* v. *Maricopa County*, 415 U. S., at 259.

[12] "Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it." *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J., dissenting).

[13] *Starns* v. *Malkerson*, 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U. S. 985 (1971), cannot be read as a contrary decision of this Court. First, summary affirmance by this Court is not to be read as an adoption of the reasoning supporting the judgment under review. *Fusari* v. *Steinberg*, 419 U. S. 379, 391 (1975) (concurring opinion). See also *Colorado Springs Amusements, Ltd.* v. *Rizzo*, 428 U. S. 913, 920–921 (1976) (BRENNAN, J., dissenting); *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Moreover, as we pointed out in *Vlandis* v. *Kline*, 412 U. S. 441, 452–453, n. 9 (1973), we considered the Minnesota one-year residency requirement examined in *Starns* a test of bona fide residence, not a return on prior contributions to the commonweal.

Valeo, 424 U. S. 1, 108 (1976); *United States* v. *Jackson*, 390 U. S. 570, 585 (1968); *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 234 (1932). Here, we need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid:

> "Sec. 4. If any provision enacted in sec. 2 of this Act [which included the dividend distribution plan in its entirety] is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that provision is nonseverable, and all provisions enacted in sec. 2 of this Act are invalid and of no force or effect." 1980 Alaska Sess. Laws, ch. 21, § 4.

However, it is of course for the Alaska courts to pass on the severability clause of the statute.

III

The only apparent justification for the retrospective aspect of the program, "favoring established residents over new residents," is constitutionally unacceptable. *Vlandis* v. *Kline*, *supra*, at 450. In our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then.

We hold that the Alaska dividend distribution plan violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the judgment of the Alaska Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL join, concurring.

I join the opinion of the Court, and agree with its conclusion that the retrospective aspects of Alaska's dividend-distribution law are not rationally related to a legitimate

state purpose. I write separately only to emphasize that the pervasive discrimination embodied in the Alaska distribution scheme gives rise to constitutional concerns of somewhat larger proportions than may be evident on a cursory reading of the Court's opinion. In my view, these concerns might well preclude even the prospective operation of Alaska's scheme.

I

I agree with JUSTICE O'CONNOR that these more fundamental defects in the Alaska dividend-distribution law are, in part, reflected in what has come to be called the "right to travel."[1] That right—or, more precisely, the federal interest in free interstate migration—is clearly, though indirectly, affected by the Alaska dividend-distribution law, and this threat to free interstate migration provides an independent rationale for holding that law unconstitutional. At the outset, however, I note that the frequent attempts to assign the right to travel some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary. JUSTICE O'CONNOR plausibly argues, *post*, at 78–81, that the right predates the Constitution and was carried forward in the Privileges and Immunities Clause of Art. IV. But equally plausible, I think, is the argument that the right resides in the Commerce Clause, see *Edwards* v. *California*, 314 U. S. 160, 173 (1941), or in the Privileges and Immunities

[1] What is notably at stake in this case, and what clearly must be taken into account in determining the constitutionality of this legislative scheme, is the *national* interest in a fluid system of interstate movement. It may be that national interests are not always easily translated into individual rights, but where the "right to travel" is involved, our cases leave no doubt that it will trigger intensified equal protection scrutiny. See, *e. g.*, *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). As the Court notes, the "right to travel" is implicated not only by "actual barriers to interstate movement," but also by "state distinctions between newcomers and longer term residents." *Ante*, at 60, n. 6.

Clause of the Fourteenth Amendment, see *id.*, at 177–178 (Douglas, J., concurring). In any event, in light of the unquestioned historic recognition of the principle of free interstate migration, and of its role in the development of the Nation, we need not feel impelled to "ascribe the source of this right to travel interstate to a particular constitutional provision." *Shapiro* v. *Thompson*, 394 U. S. 618, 630 (1969). It suffices that:

> "'The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
>
> "'. . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'" *Id.*, at 630–631, quoting *United States* v. *Guest*, 383 U. S. 745, 757–758 (1966).

As is clear from our cases, the right to travel achieves its most forceful expression in the context of equal protection analysis. But if, finding no citable passage in the Constitution to assign as its source, some might be led to question the independent vitality of the principle of free interstate migration, I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation. A scheme of the sort adopted by Alaska is inconsistent with the federal structure even in its prospective operation.

A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live. In addition, a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its

munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed, necessarily—consistent with the Framers' further idea of joining these independent sovereigns into a single Nation. But a State cannot *compound* its offer of direct benefits in the inventive manner exemplified by the Alaska distribution scheme: For if each State were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one State would thereby forfeit his accrued seniority, only to have to begin building such seniority again in his new State of residence, then the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive.

II

The Court today reaffirms the important principle that, at least with respect to a durational-residency discrimination, a State's desire "to reward citizens for past contributions" is clearly "not a legitimate state purpose." *Ante*, at 63. I do not think it "odd," *post*, at 72, that the Court disclaims reliance on the "right to travel" as the source of this limitation on state power. In my view, the acknowledged illegitimacy of that state purpose has a different heritage—it reflects not the structure of the Federal Union but the idea of constitutionally protected equality. See *Shapiro* v. *Thompson*, *supra*, at 632–633 ("The Equal Protection Clause prohibits such an apportionment of state services"); *Vlandis* v. *Kline*, 412 U. S. 441, 450, n. 6 (1973). The Constitution places the recently naturalized immigrant from a foreign land on an equal footing with those citizens of a State who are able to trace their lineage back for many generations within the State's borders. The 18-year-old native resident of a State is as much a citizen as the 55-year-old native resident. But

the Alaska plan discriminates against the recently naturalized citizen, in favor of the Alaska citizen of longer duration; it discriminates against the 18-year-old native resident, in favor of all residents of longer duration. If the Alaska plan were limited to discriminations such as these, and did not purport to apply to migrants from sister States, interstate travel would not be noticeably burdened—yet those discriminations would surely be constitutionally suspect.

The Fourteenth Amendment guarantees the equal protection of the law to anyone who may be within the territorial jurisdiction of a State. That Amendment does not suggest by its terms that equal treatment might be denied a person depending upon how long that person *has been* within the jurisdiction of the State. The Fourteenth Amendment does, however, expressly recognize one elementary basis for distinguishing between persons who may be within a State's jurisdiction at any particular time—by setting forth the requirements for state citizenship. But it is significant that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence.[2] That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.[3] And the Equal Protection Clause would not tolerate such distinctions.

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[2] "[A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 16 Wall. 36, 80 (1873). See *id.*, at 112–113 (Bradley, J., dissenting) ("A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen").

[3] The American aversion to aristocracy developed long before the Fourteenth Amendment and is, of course, reflected elsewhere in the Constitution. See Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"). See also Virginia Declaration of Rights (1776), in R. Rutland, The Birth of the Bill of Rights, App. A (1955) ("no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services").

In short, as much as the right to travel, equality of citizenship is of the essence in our Republic. As the Court notes, States may not "divide citizens into expanding numbers of permanent classes." *Ante*, at 64.

It is, of course, elementary that the Constitution does not bar the States from making reasoned distinctions between citizens: Insofar as those distinctions are rationally related to the legitimate ends of the State they present no constitutional difficulty, as our equal protection jurisprudence attests. But we have never suggested that duration of residence *vel non* provides a valid justification for discrimination. To the contrary, discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself. To be sure, allegiance and attachment may be rationally measured by length of residence—length of residence may, for example, be used to test the bona fides of citizenship—and allegiance and attachment may bear some rational relationship to a very limited number of legitimate state purposes. Cf. *Chimento* v. *Stark*, 353 F. Supp. 1211 (NH), summarily aff'd, 414 U. S. 802 (1973) (7-year citizenship requirement to run for Governor); U. S. Const., Art. I, §2, cl. 2, §3, cl. 3; Art. II, §1, cl. 5. But those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare.

Permissible discriminations between persons must bear a rational relationship to their *relevant* characteristics. While some imprecision is unavoidable in the process of legislative classification, the ideal of equal protection requires attention to individual merit, to individual need. In almost all instances, the business of the State is not with the past, but with the present: to remedy continuing injustices, to fill current needs, to build on the present in order to better the future. The past actions of individuals may be relevant in assessing their present needs; past actions may also be relevant in predicting current ability and future performance. In ad-

dition, to a limited extent, recognition and reward of past public service have independent utility for the State, for such recognition may encourage other people to engage in comparably meritorious service. But even the idea of rewarding past public service offers scarce support for the "past contribution" justification for durational-residence classifications since length of residence has only the most tenuous relation to the *actual* service of individuals to the State.

Thus, the past-contribution rationale proves much too little to provide a rational predicate for discrimination on the basis of length of residence. But it also proves far too much, for "it would permit the State to apportion all benefits and services according to the past . . . contributions of its citizens." *Shapiro* v. *Thompson*, 394 U. S., at 632–633. In effect, then, the past-contribution rationale is so far-reaching in its potential application, and the relationship between residence and contribution to the State so vague and insupportable, that it amounts to little more than a restatement of the criterion for discrimination that it purports to justify. But while duration of residence has minimal utility as a measure of things that are, in fact, constitutionally relevant, resort to duration of residence as the basis for a distribution of state largesse does closely track the constitutionally untenable position that the longer one's residence, the worthier one is of the State's favor. In my view, it is difficult to escape from the recognition that underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that "some citizens are more equal than others." We rejected that premise and, I believe, implicitly rejected most forms of discrimination based upon length of residence, when we adopted the Equal Protection Clause.

JUSTICE O'CONNOR, concurring in the judgment.

The Court strikes Alaska's distribution scheme, purporting to rely solely upon the Equal Protection Clause of the Four-

teenth Amendment. The phrase "right to travel" appears only fleetingly in the Court's analysis, dismissed with an observation that "right to travel analysis refers to little more than a particular application of equal protection analysis." *Ante*, at 60, n. 6. The Court's reluctance to rely explicitly on a right to travel is odd, because its holding depends on the assumption that Alaska's desire "to reward citizens for past contributions . . . is not a legitimate state purpose." *Ante*, at 63. Nothing in the Equal Protection Clause itself, however, declares this objective illegitimate. Instead, as a full reading of *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), and *Vlandis* v. *Kline*, 412 U. S. 441 (1973), reveals, the Court has rejected this objective only when its implementation would abridge an interest in interstate travel or migration.

I respectfully suggest, therefore, that the Court misdirects its criticism when it labels Alaska's objective illegitimate. A desire to compensate citizens for their prior contributions is neither inherently invidious nor irrational. Under some circumstances, the objective may be wholly reasonable.[1] Even a generalized desire to reward citizens for past endurance, particularly in a State where years of hardship only recently have produced prosperity, is not innately improper. The difficulty is that plans enacted to further this objective necessarily treat new residents of a State less favorably than the

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[1] A State, for example, might choose to divide its largesse among all persons who previously have contributed their time to volunteer community organizations. If the State graded its dividends according to the number of years devoted to prior community service, it could be said that the State intended "to reward citizens for past contributions." Alternatively, a State might enact a tax credit for citizens who contribute to the State's ecology by building alternative fuel sources or establishing recycling plants. If the State made this credit retroactive, to benefit those citizens who launched these improvements before they became fashionable, the State once again would be rewarding past contributions. The Court's opinion would dismiss these objectives as wholly illegitimate. I would recognize them as valid goals and inquire only whether their implementation infringed any constitutionally protected interest.

longer term residents who have past contributions to "reward." This inequality, as the Court repeatedly has recognized, conflicts with the constitutional purpose of maintaining a Union rather than a mere "league of States." See *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869). The Court's task, therefore, should be (1) to articulate this constitutional principle, explaining its textual sources, and (2) to test the strength of Alaska's objective against the constitutional imperative. By choosing instead to declare Alaska's purpose wholly illegitimate, the Court establishes an uncertain jurisprudence. What makes Alaska's purpose illegitimate? Is the purpose illegitimate under all circumstances? What other state interests are wholly illegitimate? Will an "illegitimate" purpose survive review if it becomes "important" or "compelling"?[2] These ambiguities in the Court's analysis prompt me to develop my own approach to Alaska's scheme.

Alaska's distribution plan distinguishes between long-term residents and recent arrivals. Stripped to its essentials, the plan denies non-Alaskans settling in the State the same privileges afforded longer term residents. The Privileges and Immunities Clause of Art. IV, which guarantees "[t]he Citizens of each State . . . all Privileges and Immunities of Citizens in the several States," addresses just this type of discrimination.[3] Accordingly, I would measure Alaska's

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[2] The Court's conclusion that Alaska's scheme lacks a rational basis masks a puzzling aspect of its analysis. By refusing to extend any legitimacy to Alaska's objective, the Court implies that a program designed to reward prior contributions will never survive equal protection scrutiny. For example, the programs described in n. 1, *supra*, could not survive the Court's analysis even if the State demonstrated a compelling interest in rewarding volunteer activity or promoting conservation measures. The Court's opinion, although purporting to apply a deferential standard of review, actually insures that any governmental program depending upon a "past contributions" rationale will violate the Equal Protection Clause.

[3] While the Clause refers to "Citizens," this Court has found that "the terms 'citizen' and 'resident' are 'essentially interchangeable' . . . for purposes of analysis of most cases under the Privileges and Immunities

scheme against the principles implementing the Privileges and Immunities Clause. In addition to resolving the particular problems raised by Alaska's scheme, this analysis supplies a needed foundation for many of the "right to travel" claims discussed in the Court's prior opinions.

I

Our opinions teach that Art. IV's Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer* v. *Witsell*, 334 U. S. 385, 395 (1948). The Clause protects a nonresident who enters a State to work, *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), to hunt commercial game, *Toomer*, *supra*, or to procure medical services, *Doe* v. *Bolton*, 410 U. S. 179 (1973).[4] *A fortiori*, the Privileges and Immunities Clause should protect the "citizen of State A who ventures into State B" to settle there and establish a home.

In this case, Alaska forces nonresidents settling in the State to accept a status inferior to that of oldtimers. In its first year of operation, the distribution scheme would have given $1,050 to an Alaskan who had lived in the State since

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Clause." *Hicklin* v. *Orbeck*, 437 U. S. 518, 524, n. 8 (1978) (quoting *Austin* v. *New Hampshire*, 420 U. S. 656, 662, n. 8 (1975)). This opinion, therefore, will refer to "nonresidents" of Alaska, as well as to "noncitizens" of that State.

It is settled that the Privileges and Immunities Clause does not protect corporations. See *Paul* v. *Virginia*, 8 Wall. 168 (1869). The word "Citizens" suggests that the Clause also excludes aliens. See, *e. g.*, *id.*, at 177 (dictum); L. Tribe, American Constitutional Law § 6–33, p. 411, n. 18 (1978). Any prohibition of discrimination aimed at aliens or corporations must derive from other constitutional provisions.

[4] See generally *Ward* v. *Maryland*, 12 Wall. 418, 430 (1871) (The Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; [and] to take and hold real estate . . .").

statehood. A resident of 10 years would have received $500, while a one-year resident would have received only $50. In effect, therefore, the State told its citizens: "Your status depends upon the date on which you established residence here. Those of you who migrated to the State cannot share its bounty on the same basis as those who were here before you." Surely this scheme imposes one of the "disabilities of alienage" prohibited by Art. IV's Privileges and Immunities Clause. See *Paul* v. *Virginia*, *supra*, at 180.

It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and nonresidents. This argument, however, misinterprets the force of Alaska's distribution system. Alaska's scheme classifies citizens on the basis of their former residential status, imposing a relative burden on those who migrated to the State after 1959. Residents who arrived in Alaska after that date have a less valuable citizenship right than do the oldtimers who preceded them. Citizens who arrive in the State tomorrow will receive an even smaller claim on Alaska's resources. The fact that this discrimination unfolds after the nonresident establishes residency does not insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause. Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the State on less favorable terms than those who arrived earlier. The circumstance that some of the disfavored citizens already live in Alaska does not negate the fact that "the citizen of State A who ventures into [Alaska]" to establish a home labors under a continuous disability.[5]

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[5] See Note, A Constitutional Analysis of State Bar Residency Requirements under the Interstate Privileges and Immunities Clause of Article IV, 92 Harv. L. Rev. 1461, 1464–1465, n. 17 (1979) (labeling contrary argument "technical").

As the Court points out, *ante*, at 59–60, n. 5, Alaska's plan differentiates even among native Alaskans, by tying their benefits to date of birth. If

If the Privileges and Immunities Clause applies to Alaska's distribution system, then our prior opinions describe the proper standard of review. In *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371 (1978), we held that States must treat residents and nonresidents "without unnecessary distinctions" when the nonresident seeks to "engage in an essential activity or exercise a basic right." *Id.*, at 387. On the other hand, if the nonresident engages in conduct that is not "fundamental" because it does not "bea[r] upon the vitality of the Nation as a single entity," the Privileges and Immunities Clause affords no protection. *Id.*, at 387, 383.

Once the Court ascertains that discrimination burdens an "essential activity," it will test the constitutionality of the discrimination under a two-part test. First, there must be "'something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" *Hicklin* v. *Orbeck*, *supra*, at 525–526 (quoting *Toomer* v. *Witsell*, *supra*, at 398). Second, the Court must find a "substantial relationship" between the evil and the discrimination practiced against the noncitizens. 437 U. S., at 527.

Certainly the right infringed in this case is "fundamental." Alaska's statute burdens those nonresidents who choose to settle in the State.[6] It is difficult to imagine a right more

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the scheme merely distributed benefits on the basis of age, without reference to the date beneficiaries established residence in Alaska, I doubt it would violate the Privileges and Immunities Clause. Under those circumstances, a 25-year-old Texan establishing residence in Alaska would acquire the same privileges of citizenship held by a 25-year-old native Alaskan. The scheme would not treat the citizen who moves to the State differently from citizens who already reside there. The Court does not explain whether it would find such an age-based scheme objectionable.

[6]The "burden" imposed on nonresidents is relative to the benefits enjoyed by residents. It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the new State that he lacked completely in his former State. The Clause addresses only differences in treatment; it does not judge the quality of treatment a State affords citizens and noncitizens.

essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes.[7] Alaska's encumbrance on the right of nonresidents to settle in that State, therefore, must satisfy the dual standard identified in *Hicklin*.

Alaska has not shown that its new residents are the "peculiar source" of any evil addressed by its disbursement scheme. The State does not argue that recent arrivals constitute a particular source of its population turnover problem. Indeed, the State urges that it has a special interest in persuading young adults, who have grown to maturity in the State, to remain there. Brief for Appellees 35, n. 24. Nor is there any evidence that new residents, rather than old, will foolishly deplete the State's mineral and financial resources. Finally, although Alaska argues that its scheme compensates residents for their prior tangible and intangible contributions to the State, nonresidents are hardly a peculiar source of the "evil" of partaking in current largesse without having made prior contributions. A multitude of native Alaskans—including children and paupers—may have failed to contribute to the State in the past. Yet the State does not dock pau-

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[7] See also *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935) (the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"); *Paul* v. *Virginia*, 8 Wall., at 180 ("Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists"); *Edwards* v. *California*, 314 U. S. 160, 173 (1941) (Constitution prohibits "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders").

pers for their prior failures to contribute, and it awards every person over the age of 18 dividends equal to the number of years that person has lived in the State.

Even if new residents were the peculiar source of these evils, Alaska has not chosen a cure that bears a "substantial relationship" to the malady. As the dissenting judges below observed, Alaska's scheme gives the largest dividends to residents who have lived longest in the State. The dividends awarded to new residents may be too small to encourage them to stay in Alaska. The size of these dividends appears to give new residents only a weak interest in prudent management of the State's resources. As a reward for prior contributions, finally, Alaska's scheme is quite ill-suited. While the phrase "substantial relationship" does not require mathematical precision, it demands at least some recognition of the fact that persons who have migrated to Alaska may have contributed significantly more to the State, both before and after their arrival, than have some natives.

For these reasons, I conclude that Alaska's disbursement scheme violates Art. IV's Privileges and Immunities Clause. I thus reach the same destination as the Court, but along a course that more precisely identifies the evils of the challenged statute.

II

The analysis outlined above might apply to many cases in which a litigant asserts a right to travel or migrate interstate.[8] To historians, this would come as no surprise. Arti-

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[8] Any durational residency requirement, for example, treats nonresidents who have exercised their right to settle in a State differently from longer term residents. This is not to say, however, that all such requirements would fail scrutiny under the Privileges and Immunities Clause. The durational residency requirement upheld in *Sosna* v. *Iowa*, 419 U. S. 393 (1975) (one year to obtain divorce), for example, would have survived under the analysis outlined above. In *Sosna* the State showed that nonresidents were a peculiar source of the evil addressed by its durational residency requirement. Those persons could misrepresent their attachment

cle IV's Privileges and Immunities Clause has enjoyed a long association with the rights to travel and migrate interstate.

The Clause derives from Art. IV of the Articles of Confederation. The latter expressly recognized a right of "free ingress and regress to and from any other State," in addition to guaranteeing "the free inhabitants of each of these states . . . [the] privileges and immunities of free citizens in the several States."[9] While the Framers of our Constitution omitted the reference to "free ingress and regress," they retained the general guaranty of "privileges and immunities." Charles Pinckney, who drafted the current version of Art. IV, told the Convention that this Article was "formed exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, Records of the Federal Convention of 1787, p. 112 (1934). Commentators, therefore, have as-

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to Iowa and obtain divorces that would be susceptible to collateral attack in other States. Iowa adopted a reasonable response to this problem by requiring nonresidents to demonstrate their bona fide residency for one year before obtaining a divorce. I am confident that the analysis developed in *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), will adequately identify other legitimate durational residency requirements.

[9] Even before adoption of the Articles, a few of the Colonies explicitly protected freedom of movement. The Rhode Island Charter gave members of that Colony the right "to passe and repasse with freedome, into and through the rest of the English Collonies, upon their lawful and civill occasions." Z. Chafee, Three Human Rights in the Constitution of 1787, p. 177 (1956). The Massachusetts Body of Liberties provided: "Every man of or within this Jurisdiction shall have free libertie, not with standing any Civill power, to remove both himselfe and his familie at their pleasure out of the same, provided there be no legall impediment to the contrarie." *Id.*, at 178. Massachusetts showed some of the same liberality to foreigners entering the Colony:

"If any people of other Nations professing the true Christian Religion shall flee to us from the Tiranny or oppression of their persecutors, or from famyne, warres, or the like necessary and compulsarie cause, They shall be entertayned and succoured among us, according to that power and prudence god shall give us." *Ibid.*

These attitudes contrasted with the more restrictive views prevailing in 17th-century Europe. See generally *id.*, at 163–171.

sumed that the Framers omitted the express guaranty merely because it was redundant, not because they wished to excise the right from the Constitution.[10]

Early opinions by the Justices of this Court also traced a right to travel or migrate interstate to Art. IV's Privileges and Immunities Clause. In *Corfield* v. *Coryell*, 6 F. Cas. 546, 552 (No. 3,230) (CC ED Pa. 1823), for example, Justice Washington explained that the Clause protects the "right of a citizen of one state to pass through, or to reside in any other state." Similarly, in *Paul* v. *Virginia*, 8 Wall., at 180, the Court found that one of the "undoubt[ed]" effects of the Clause was to give "the citizens of each State . . . the right of free ingress into other States, and egress from them . . . ." See also *Ward* v. *Maryland*, 12 Wall. 418, 430 (1871). Finally, in *United States* v. *Wheeler*, 254 U. S. 281, 297–298 (1920), the Court found that the Clause fused two distinct concepts: (1) "the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from" their own States, and (2) the right to exercise the same privileges in other States.

History, therefore, supports assessment of Alaska's scheme, as well as other infringements of the right to travel, under the Privileges and Immunities Clause. This Clause

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[10] See, *e. g.*, *id.*, at 185; Note, The Right to Travel and Exclusionary Zoning, 26 Hastings L. J. 849, 858–859 (1975); Comment, The Right to Travel: In Search of a Constitutional Source, 55 Neb. L. Rev. 117, 119–120, n. 14 (1975); Comment, A Strict Scrutiny of the Right to Travel, 22 UCLA L. Rev. 1129, 1130, n. 7 (1975).

See also *Austin* v. *New Hampshire*, 420 U. S., at 661 (footnotes omitted) (Article IV of the Articles of Confederation was "carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation"); *United States* v. *Wheeler*, 254 U. S. 281, 294 (1920) ("the text of Article IV, § 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and . . . that view has been so conclusively settled as to leave no room for controversy").

may not address every conceivable type of discrimination that the Court previously has denominated a burden on interstate travel. I believe, however, that application of the Privileges and Immunities Clause to controversies involving the "right to travel" would at least begin the task of reuniting this elusive right with the constitutional principles it embodies. Because I believe that Alaska's distribution scheme violates the Privileges and Immunities Clause of Art. IV, I concur in the Court's judgment insofar as it reverses the judgment of the Alaska Supreme Court.

JUSTICE REHNQUIST, dissenting.

Alaska's dividend distribution scheme respresents one State's effort to apportion unique economic benefits among its citizens. Although the wealth received from the oil deposits of Prudhoe Bay may be quite unlike the economic resources enjoyed by most States, Alaska's distribution of that wealth is in substance no different from any other State's allocation of economic benefits. The distribution scheme being in the nature of economic regulation, I am at a loss to see the rationality behind the Court's invalidation of it as a denial of equal protection. This Court has long held that state economic regulations are presumptively valid, and violate the Fourteenth Amendment only in the rarest of circumstances:

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, *e. g.*, *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regu-

> lation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976).

See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456 (1981); *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976).

Despite the highly deferential approach which we invariably have taken toward state economic regulations, the Court today finds the retroactive aspect of the Alaska distribution scheme violative of the Fourteenth Amendment. The Court concludes that the State's first two justifications are not rationally related to the retroactive portion of the distribution scheme, and that the third justification—the reward of citizens for their past contributions—is not a legitimate state objective. But the illegitimacy of a State's recognizing the past contributions of its citizens has been established by the Court only in certain cases considering an infringement of the right to travel,[1] and the majority itself rightly declines to ap-

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[1] The Court relies upon *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), and *Vlandis* v. *Kline*, 412 U. S. 441 (1973), in holding that Alaska may not justify its dividend distribution scheme by a desire to reward its citizens for their past contributions. In *Shapiro*, however, the Court found that the classification at issue "touche[d] on the fundamental right of interstate movement" and therefore could be justified only if it promoted a "*compelling* state interest." 394 U. S., at 638 (emphasis in original). Similarly, *Vlandis* concerned the right to move to and establish residency in Connecticut, and noted only in dicta that rewarding citizens for their past contributions was an impermissible state objective. See 412 U. S., at 449–450, and n. 6.

Although I have expressed my disagreement with this holding even in the right-to-travel cases, see *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 286–287 (1974) (REHNQUIST, J., dissenting); *Vlandis* v. *Kline*, *supra*, at 468–469 (same), there is no need to rely upon that dissenting position here. The majority does not analyze this as a right-to-travel case. Compare *ante*, at 60–61, with *Memorial Hospital* v. *Maricopa County*, *supra*, at 261–262, and *Shapiro* v. *Thompson*, *supra*, at 634, 638.

ply the strict scrutiny analysis of those right-to-travel cases. See *ante*, at 60–61. The distribution scheme at issue in this case impedes no person's right to travel to and settle in Alaska; if anything, the prospect of receiving annual cash dividends would encourage immigration to Alaska. The State's third justification cannot, therefore, be dismissed simply by quoting language about its legitimacy from right-to-travel cases which have no relevance to the question before us.

So understood, this case clearly passes equal protection muster. There can be no doubt that the state legislature acted rationally when it concluded that dividends retroactive to the year of statehood would "recognize the 'contributions of various kinds, both tangible and intangible,' which residents have made during their years of state residency." 619 P. 2d 448, 458 (Alaska 1980). Nor can there be any doubt that Alaska, perhaps more than any other State in the Union, has good reason for recognizing such contributions.[2] Be-

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[2] As the Alaska Supreme Court noted, those who have lived in Alaska from the year of its statehood have borne unusual expenses and hardships:

" 'A government such as the one embodied in the Alaska constitution, . . . with its complete range of governmental services, was expensive for a State with limited sources of taxation. Alaska could only boast a couple of pulp mills. . . . The State's business enterprises were small and catered mostly to local needs. In addition, Alaska's population was modest and hardly amounted to more than that of a medium-sized city in the continental United States.

" 'Accordingly, revenues were small. Yet, the demands were great. The State government had to provide all the governmental services and social overhead required by modern American society. For instance, it would have been relatively simple to build a few roads, furnish normal police protection, and establish the customary school facilities. But nothing was normal in Alaska; it was and remains a land of superlatives. Subarctic engineering is relatively new, but the State would have to face the problem of permafrost conditions that frequently cause the roadtop to buckle and heave. Police protection would have to be provided for an area one-fifth the size of the forty-eight United States but with very few roads available. Flying would become a way of life for law enforcement officials as well as other Alaskans—an expensive way of life. "Bush schools" scattered along

cause the distribution scheme is thus rationally based, I dissent from its invalidation under the guise of equal protection analysis.[3] In striking down the Alaskan scheme, the Court seems momentarily to have forgotten "the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge* v. *Williams*, 397 U. S. 471, 486 (1970).

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the Aleutian chain, through the Yukon Valley, and on the Seaward Peninsula and the islands of southeastern Alaska were expensive to maintain. It was not until the discovery of oil on a large scale that the picture changed.'" 619 P. 2d, at 462, n. 37 (quoting C. Naske, An Interpretive History of Alaskan Statehood 169–170 (1973)).

[3] I also disagree with the suggestion of JUSTICE O'CONNOR that the Alaska distribution scheme contravenes the Privileges and Immunities Clause of Art. IV of the Constitution. That Clause assures that *nonresidents* of a State shall enjoy the same privileges and immunities as residents enjoy: "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer* v. *Witsell*, 334 U. S. 385, 395 (1948). We long ago held that the Clause has no application to a citizen of the State whose laws are complained of. "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens." *Slaughter-House Cases*, 16 Wall. 36, 77 (1873).

CORY, CONTROLLER OF CALIFORNIA, ET AL. *v.* WHITE, ATTORNEY GENERAL OF TEXAS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80–1556. Argued January 18, 1982—Decided June 14, 1982

Both Texas and California assert the right to levy state death taxes on the estate of Howard Hughes, the taxing officials of each State claiming that Hughes was domiciled in their State at the time of his death. The administrator of the estate filed an action in Federal District Court under the Federal Interpleader Act, alleging that the respective state officials were seeking to tax the estate on the basis of inconsistent claims. The District Court dismissed the action for lack of subject-matter jurisdiction because of the failure to satisfy the Act's requirement that there be diversity of citizenship between at least two adverse parties. The Court of Appeals reversed, holding that the requisite diversity was present between the administrator and the County Treasurer of Los Angeles County. The court rejected the State's claim that although the suit was nominally against state officials, it was in effect a suit against two sovereign States barred by the Eleventh Amendment.

Held: The Eleventh Amendment bars the statutory interpleader action. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292. Contrary to the Court of Appeals' view, *Edelman* v. *Jordan*, 415 U. S. 651, did not overrule *Worcester County Trust Co.* Pp. 89–91.

629 F. 2d 397, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 91. POWELL, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 92.

Jerome B. Falk, Jr., argued the cause for petitioners. With him on the briefs were *Martin R. Glick*, *Steven L. Mayer*, *Paul J. Van Osselaer*, and *Myron Siedorf*.

O. Clayton Lilienstern argued the cause for respondents Lummis et al. With him on the brief were *Patricia A. Stevenson*, *R. James George, Jr.*, *John M. Harmon*, and *James William Moore*. *Rick Harrison* argued the cause

for respondents White et al. With him on the brief were *Mark White*, Attorney General of Texas, *pro se*, *Gilbert J. Bernal, Jr.*, Assistant Attorney General, and *David Deaderick*.

JUSTICE WHITE delivered the opinion of the Court.

In this case, both Texas and California assert the right to levy state death taxes on the estate of Howard Hughes. The laws of each State impose an inheritance tax on the real and tangible personal property located within its borders, and upon the intangible personalty, wherever situated, of a person domiciled in the State at the time of death. Under the laws of Texas and California, an individual has but one domicile at any time. Taxing officials in each State assert that Howard Hughes was domiciled in their State at the time of his death. The issue before us is whether the Federal Interpleader Act, 28 U. S. C. § 1335, provides a jurisdictional basis for resolution of inconsistent death tax claims by the officials of two States.

I

This case is the sequel to *California* v. *Texas*, 437 U. S. 601 (1978). There, California petitioned for leave to file a complaint against Texas under this Court's original jurisdiction. At that time, we denied the motion. In concurring opinions, however, four Justices suggested that a determination of Hughes' domicile might be obtained in federal district court pursuant to the Federal Interpleader Act, 28 U. S. C. § 1335.[1]

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[1] The Federal Interpleader Act, 28 U. S. C. § 1335, provides:

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

Three weeks after the decision in *California* v. *Texas*, the administrator of the estate filed a statutory interpleader action in the United States District Court for the Western District of Texas. Asserting that the officials of the two States were seeking to tax the estate on the basis of inconsistent claims that each of their respective States was Howard Hughes' domicile at death, it requested the District Court to adjudicate the issue of domicile. The District Court entered a temporary restraining order prohibiting the California and Texas taxing officials from pursuing domicile-based inheritance tax claims in any other forum, including their own state courts.

The District Court then dismissed for lack of subject-matter jurisdiction for failure to satisfy the requirement of § 1335 that there be diversity of citizenship between at least two adverse claimants. It found that the administrator was not a claimant. Among the claimants, it held that the County Treasurer for Los Angeles County was a citizen of California for diversity purposes, citing *Moor* v. *County of Alameda*, 411 U. S. 693 (1973). The court ruled, however, that the State of Texas, rather than its taxing officials, was the opposing claimant and that because a State is not a citizen of itself for diversity purposes, *Postal Telegraph Cable Co.* v.

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

Alabama, 155 U. S. 482 (1894), the action did not involve two or more adverse claimants of diverse citizenship as required by the statute.

The Court of Appeals for the Fifth Circuit reversed the order of dismissal. *Lummis* v. *White*, 629 F. 2d 397 (1980). In addition to the County Treasurer, it found the administrator of the estate, a citizen of Nevada, to be a claimant for the purposes of statutory interpleader. It recognized that *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939), held that a citizenship of a disinterested stakeholder could not be considered in determining interpleader jurisdiction. Reasoning, however, that here the administrator's legal duty of preserving the estate's assets from the double death tax liability and his assertion that Hughes was domiciled in Nevada, which has no state death tax, made the administrator an interested stakeholder, the court further held that the citizenship of an interested stakeholder may be considered for purposes of establishing diversity under § 1335. The requisite diversity—between the administrator and the County Treasurer of Los Angeles County—was therefore present.

The Court of Appeals went on to reject the States' claim that although the suit was nominally against state officials, it was in effect a suit against two sovereign States barred by the Eleventh Amendment. Recognizing that *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937), had squarely held that an interpleader action in all critical respects similar to this one was barred by the Eleventh Amendment, the Court of Appeals, relying on the concurring views of four Justices in *California* v. *Texas*, held that *Edelman* v. *Jordan*, 415 U. S. 651 (1974), had silently, but effectively, overruled *Worcester*, and that the Eleventh Amendment as interpreted in *Edelman* did not bar the interpleader action.

The California officials petitioned for certiorari and, at the same time, filed a new motion seeking leave to file a com-

plaint against Texas under this Court's original jurisdiction. Because of the troubling issues involving federal-court jurisdiction in such disputes, we granted certiorari. 452 U. S. 904.

II

In *Worcester County Trust Co.* v. *Riley*, *supra*, the States of California and Massachusetts each claimed to be the domicile of a decedent and to have the right to assess death taxes on his entire intangible estate. A federal interpleader action followed, the estate naming as defendant the revenue officers of California and Massachusetts. This Court unanimously held that the case was in reality a suit against the States and that it was barred by the Eleventh Amendment. In arriving at this conclusion, the Court applied the accepted rules (1) that "a suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the state, which the Constitution forbids," 302 U. S., at 296, and (2) that "generally, suits to restrain action of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States." *Id.*, at 297. The Court held that there could be no credible claim of a violation of federal law since it was clear from prior cases that inconsistent determinations by the courts of two States as to the domicile of a taxpayer did not raise a substantial federal constitutional question. The Court also concluded that the claim that the officials were acting without authority under state law was insufficient. Hence, "[s]ince the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone a state can act, restraint of their action, which the bill of complaint prays, is restraint of state action, and the suit is in substance one against the State which the Eleventh Amendment forbids." *Id.*, at 299–300.

The Court of Appeals' opinion that *Edelman* v. *Jordan* had overruled *Worcester* rested on a passage in the *Edelman* opinion that it interpreted as limiting the bar of the Eleventh Amendment to suits "by private parties seeking to impose a liability which must be paid from public funds in the state treasury." 415 U. S., at 663. Because the interpleader plaintiff, the administrator of the estate, had sought only prospective relief, the appellate court held that the Eleventh Amendment did not bar his suit.

We are unpersuaded by this view of *Edelman*. That case involved a suit against state officials claiming that their administration of a particular federal-state program was contrary to federal regulations and the Constitution. Among other things, the plaintiffs sought a judgment for benefits that had not been paid them. The case was against individual officers who allegedly were violating federal law, and it therefore arguably fell outside the reach of the Eleventh Amendment under *Ex parte Young*, 209 U. S. 123 (1908). *Edelman* held, however, that the case was in effect a suit against the State itself because a judgment payable from state funds was demanded. It was correctly noted that *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459 (1945), was authority for this result.

Edelman did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought.[2] It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to

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[2] The dissent mischaracterizes *Edelman* as asserting that the Eleventh Amendment bars "only" suits seeking money damages. *Post*, at 96. *Edelman* recognized the rule "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment," 415 U. S., at 663, but never asserted that such suits were the only ones so barred.

extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." Thus, the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. *Edelman* did not embrace, much less imply, any such proposition.

Neither did *Edelman* deal with a suit naming a state officer as defendant, but not alleging a violation of either federal or state law. Thus, there was no occasion in the opinion to cite or discuss the unanimous opinion in *Worcester* that the Eleventh Amendment bars suits against state officers unless they are alleged to be acting contrary to federal law or against the authority of state law. *Edelman* did not hold that suits against state officers who are not alleged to be acting against federal or state law are permissible under the Eleventh Amendment if only prospective relief is sought. Whether or not that would be the preferable rule, *Edelman* v. *Jordan* did not adopt it.

Furthermore, if that were to be the law, *Worcester* must in major part be overruled. We are unwilling, however, to overrule that decision and narrow the scope of the Eleventh Amendment to the extent that action would entail. We hold that the Eleventh Amendment bars the statutory interpleader sought in this case. The judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN, concurring in the judgment.

In *California* v. *Texas*, 437 U. S. 601 (1978), I joined in the judgment of the Court denying California's motion for leave to file an original complaint. I was of the view that California's motion should be denied, "at least until such time as it is shown that . . . a statutory interpleader action cannot or will not be brought." *Id.*, at 602. I also stated that I was "not

so sure as" Justice Stewart and JUSTICE POWELL that *Texas* v. *Florida*, 306 U. S. 398 (1939), had been wrongly decided. 437 U. S., at 601. See *id.*, at 606 (Stewart, J., concurring); *id.*, at 615 (POWELL, J., concurring).

Substantially for the reasons set forth in the opinion of the Court, it is now clear to me that so long as *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937), remains good law, an interpleader suit in the district court is not a practical solution to the problem of potential double taxation presented in cases such as these. As JUSTICE POWELL persuasively argues in Part III of his dissenting opinion, later cases, construing the Due Process Clause, have undermined *Worcester County*'s holding that the unfairness of double taxation on the basis of conflicting determinations of domicile does not rise to constitutional dimensions. And JUSTICE POWELL is surely correct in observing that "[t]he threat of multiple taxation based solely on domicile simply is incompatible with the structural principles of a federal system recognizing as 'fundamental' a constitutional right to travel." *Post*, at 101.

But if *Worcester County* is *not* to be overruled, and interpleader is not available to provide relief from the possibility of duplicative taxation of this estate, I think it appropriate under *Texas* v. *Florida*, *supra*, to exercise our original jurisdiction to decide the present controversy. I agree with Professor Chafee, quoted *post*, at 101, that "[s]omewhere within [the] federal system we should be able to find remedies for the frictions which that system creates." Where such a remedy exists—even if only in the narrow class of cases falling within the holding of *Texas* v. *Florida*—it should be employed. The exercise of the Court's original jurisdiction in circumstances such as this is both just and prudent, and very likely in accordance with the Framer's original intent.

JUSTICE POWELL, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

The Court today decides two cases arising from the same set of facts, the instant case and *California* v. *Texas*, *post*,

p. 164. Both cases involve the efforts of officials of California and Texas to tax the intangible property of the late Howard Hughes. Each State asserts its right to tax the Hughes estate on the basis of Hughes' domicile. Yet both recognize that Hughes could have had only one domicile at the time of his death.

In order to avoid multiple taxation that all agree would be unfair, the administrator of the Hughes estate invoked the Federal Interpleader Act[1] as a means of litigating Hughes' domicile in one federal proceeding. The administrator alleged in his complaint, however, that Hughes was not a domiciliary of either California or Texas, but rather of the State of Nevada. App. 10.[2]

In the instant case, the Court holds today that this interpleader action is barred by the Eleventh Amendment. The Court does not dispute that multiple taxation based on domicile is unfair. Nor does it deny that the burden of multiple taxation ordinarily would fall, not on one of the claiming States, but solely on the heirs to an estate. But the Court opinion does not address these issues directly. Rigidly applying an aged and indefensible precedent, the Court denies the administrator and heirs of an estate any federal forum in which to resolve incompatible claims of domicile.

Having held in this case that there is no legal bar to both California and Texas taxing the Hughes estate on the basis of domicile, the Court surprisingly concludes in today's decision in *California* v. *Texas*, *post*, p. 164, that there presently exists a justiciable controversy "between" those two States as to which actually was Hughes' domicile.[3] But these two cases—both decided today and both arising from the same set of facts—cannot be reconciled. Under the holding in the in-

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[1] 28 U. S. C. § 1335.

[2] Nevada imposes no estate tax and therefore has not appeared as a party.

[3] As a result of this decision, the Hughes heirs apparently will not suffer unfair double taxation. Other heirs of other estates presumably will not be so fortunate.

stant case that there is no federal prohibition against two States taxing the Hughes estate on the basis of domicile, the mere assertion of claims by the two States cannot suffice to establish a controversy "between" them. In finding that there is a case ripe for decision, the Court must rely on a double contingency: first, that both States *might* win judgments in their own courts that Hughes was a domiciliary subject to estate taxation; and second, that in such a case the Hughes estate *might* not be large enough to satisfy both claims. This is too speculative a foundation to support the conclusion that there is a case or controversy appropriately within our original jurisdiction.

In my view the Court's decisions in these cases rest on a misconception of the rights and obligations created by our federal system, both in its constitutional and in its statutory aspects. Accordingly I dissent.

I

The issues before the Court today are substantially identical to those presented in *California* v. *Texas*, 437 U. S. 601 (1978). In that case the Court unanimously denied California's motion for leave to file an original complaint. The Court's one-sentence order did not explain our decision to decline to exercise our exclusive original jurisdiction over controversies "between" States. Justice Stewart, however, in an opinion that JUSTICE STEVENS and I joined, stated fully his reasons for agreeing that there existed no case or controversy between States.[4] He argued cogently that California's complaint "contain[ed] the seeds of two distinct lawsuits":

> "One is a dispute between two States as to the proper division of a finite sum of money. The other is a suit in the nature of interpleader to settle the question of a de-

[4] JUSTICE BRENNAN also filed a concurring opinion tentatively accepting Justice Stewart's conclusion and stating that he would "deny California's motion, at least until such time as it is shown that . . . a statutory interpleader action cannot or will not be brought." 437 U. S., at 601, 602. I too filed a concurring opinion. *Id.*, at 615.

> cedent's domicile for purposes of the taxes to be imposed upon his estate. But the suit in the nature of interpleader is not within the original and exclusive jurisdiction of this Court because it is not a dispute between States. And the dispute between the States, if indeed it is justiciable at all, is certainly not yet a case or controversy within the constitutional meaning of that term." *Id.*, at 610–611.

No material fact has changed since 1978. On the premises of the Court's opinion, there still is no justiciable controversy between Texas and California. See *California* v. *Texas*, *post*, at 170 (POWELL, J., dissenting).[5] There is, however, a ripe dispute about the estate's tax liability to the two States—a dispute of the kind for which federal interpleader jurisdiction ought to be available.

II

In our 1978 decision in *California* v. *Texas*, *supra*, four Justices of this Court suggested that the administrator of the Hughes estate might invoke the Federal Interpleader Act to protect the estate from taxation based on inconsistent claims of domicile. Contradicting the clear message conveyed by our decision in that case, the Court today finds interpleader unavailable on the ground that a suit against the state taxing officials is barred by the Eleventh Amendment.

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[5] The Court's main ground for distinguishing the situation in 1978 from the situation today seems to be that "it seemed to several Members of the Court [in 1978] that statutory interpleader might obviate the need to exercise our original jurisdiction." *California* v. *Texas*, *post*, at 168. Yet this argument simply is unresponsive to the question whether there is an actual case or controversy for which our original jurisdiction properly can be invoked. The Court notes that "several other uncertainties" have disappeared. *Post*, at 169. But its arguments are makeweights. Until the States have obtained conflicting judgments in their own courts, there is no ripe "dispute between two States as to the proper division of [the] finite sum of money" comprising the Hughes estate. *California* v. *Texas*, 437 U. S. 601, 610 (1978) (Stewart, J., concurring). See *post*, at 170 (POWELL, J., dissenting).

The concurring opinions in *California* v. *Texas*, *supra*, all proposed that the administrator of the Hughes estate might invoke the "fiction" of *Ex parte Young*, 209 U. S. 123 (1908), as interpreted in *Edelman* v. *Jordan*, 415 U. S. 651 (1974), to bring an interpleader action naming as defendants the taxing officials of Texas and California. The Court today holds otherwise. According to the Court, it is the lawful function of the state officials to litigate Hughes' domicile. There is accordingly no colorable claim that they are acting in excess of their authority under state law; no constitutional violation is alleged; and *Edelman* v. *Jordan* is read narrowly to retain the Eleventh Amendment bar to injunctive suits against state officials not acting unlawfully, even in this case in which no money damages are sought from the state treasury.

There can be no doubt that *Edelman* will admit of a broader construction. The plain language of that decision asserts that the Eleventh Amendment bars only suits "by private parties seeking to impose a liability which must be paid from public funds in the state treasury," *id.*, at 663, and not actions that may have "fiscal consequences to state treasuries . . . [that are] the necessary result of compliance with decrees which by their terms [are] prospective in nature," *id.*, at 667–668. Thus, at least in a case such as this, in which the very controversy is the *result* of our federal system, I continue to believe that resort to federal interpleader is not proscribed by the Eleventh Amendment as construed by *Edelman* v. *Jordan*.

In rejecting this interpretation of *Edelman*, the Court relies at the last on *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937). If this broader view of *Edelman* "were to be the law," the Court reasons, "*Worcester* must in major part be overruled." *Ante*, at 91. In light of *Edelman*, however, it must be recognized that the law has changed since 1937, and that the legal assumptions on which *Worcester County* rested no longer are uniformly valid. See *California* v. *Texas*, 437 U. S., at 601 (BRENNAN, J., concurring). If *Worcester County* cannot be defended on the basis of its in-

ternal logic and adherence to constitutional principles, this Court should not be bound by it.

III

The Court today continues to reason from the premise, accepted by *Worcester County*, that multiple taxation on the basis of domicile does not offend the Constitution—even in a case in which both of the taxing States concede that a person may have but one domicile.[6] In my view this premise is wrong. As an alternative to the approach that I embraced in *California* v. *Texas*, I now would be prepared to overrule *Worcester County* on this point and to hold that multiple taxation on the basis of domicile—at least insofar as "domicile" is treated as indivisible, so that a person can be the domiciliary of but one State—is incompatible with the structure of our federal system.

A

As Justice Stewart demonstrated in *California* v. *Texas*, the Court's conclusion in *Texas* v. *Florida*, 306 U. S. 398 (1939)—that there was a controversy between States, identifiable by analogy to a suit in the nature of interpleader—can be explained only by its concern for "the plight of the estate, which was indeed confronted with a 'substantial likelihood' of

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[6] *Worcester County* must be viewed in the context of a constitutional history that is hardly one of settled consistency. Only seven years before the Court decided *Worcester County*, in *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204 (1930), this Court had overruled *Blackstone* v. *Miller*, 188 U. S. 189 (1903), and held that the Due Process Clause forbids the multiple taxation of intangibles. For a time *Farmers Loan & Trust Co.* appeared to have established that only the single State of a person's domicile could tax intangible property in a decedent's estate. See *First National Bank* v. *Maine*, 284 U. S. 312 (1932). But the Court then reached the contrary conclusion in *Worcester County*, finding that inconsistent state-court adjudications of domicile and consequent assessment of estate taxes did not violate the Due Process Clause. *First National Bank* v. *Maine*, *supra*, then squarely was overruled by *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174, 181 (1942), which held that multiple taxation of intangibles did not *per se* offend the Constitution.

multiple and inconsistent tax claims." 437 U. S., at 606. Yet this focus of concern found no justification in the principles actually stated in *Texas* v. *Florida*, and it finds no justification in the principles on which the Court rests today. If the Constitution and laws provide no direct remedy to a decedent's estate faced with multiple taxation on the basis of domicile, there is no principled reason to protect the estate, before the fact, against the bare possibility that multiple taxation may exhaust the estate completely. See 437 U. S., at 611.[7] In my view, however, such taxation is not only unfair but offensive to the Due Process Clause of the Fourteenth Amendent.

B

Our decisions consistently have recognized that state taxation must be rationally related to "'values connected with the taxing state.'" *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 273 (1978), quoting *Norfolk & Western R. Co.* v. *Missouri State Tax Comm'n*, 390 U. S. 317, 325 (1968). As framed by Justice Frankfurter in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940):

> "Th[e] test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

Under these principles tangible property generally may be taxed only by the State where it is located. *Curry* v. *McCanless*, 307 U. S. 357, 364 (1939).[8] Physical presence

[7] "If it is unfair to subject an estate to two domicile-based taxes when all agree that it is possible to have only one domicile, that unfairness is just as great, if not greater, when a decedent's estate is able to pay the taxes to both States." 437 U. S., at 611.

[8] "When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership . . . are so narrowly restricted to the state in whose

also is required to justify a state succession tax on the transfer of real property occasioned by the death of the owner. *Treichler* v. *Wisconsin*, 338 U. S. 251 (1949); *Frick* v. *Pennsylvania*, 268 U. S. 473, 492 (1925).

In contrast with real property, intangible personal property is not physically located in any particular place, at least in any simple sense.[9] Moreover, there may be more than one State that has a significant connection with intangible property—for example, the State in which a trust's assets are administered and the State in which the trustee is domiciled. See *Curry* v. *McCanless*, *supra*. Recognizing these differences, this Court has upheld the multiple taxation of intangible property. The decisions in which the Court has done so have not, however, undermined the fundamental principle that a State's levy of a tax must be connected rationally with the values on which the tax is imposed or with protections that the State has afforded.

In this case both California and Texas—as most States—recognize that a person can have but one domicile. And it would appear settled that domicile provides the only adequate basis for taxation of intangible property in a decedent's estate, not located in the State or otherwise dependent on the protection of its laws. See *Curry* v. *McCanless*, *supra*, at

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territory the property is physically located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed . . . ." 307 U. S., at 364.

[9] See *Curry* v. *McCanless*, 307 U. S. 357, 365–366 (1939):

"Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights."

365–366; cf. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 286–288 (1977) (defining Commerce Clause limits on state taxation in terms of connections to and benefits conferred by the taxing State). Here neither State alleges an entitlement to tax the Hughes estate on any other basis. From these premises it follows that multiple taxation based solely on conflicting determinations of domicile not only is unfair, but that taxation on this basis by at least one of the States must lack the only predicate asserted to justify its levy under the Due Process Clause.[10]

It is, of course, true that in 1937 *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, held that this admitted unfairness did not offend the Constitution. But *Worcester County*'s holding on this point already has been undermined, not only by intervening decisions reiterating due process limits on state taxation of intangible property, see *Norfolk & Western R. Co.* v. *Missouri State Tax Comm'n*, *supra*, at 323–326, and of income, see, *e. g.*, *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 436–442 (1980), but also by cases in which this Court has recognized a fundamental right to travel. See, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330

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[10] See Chafee, Federal Interpleader Since the Act of 1936, 49 Yale L. J. 377, 383–384 (1940) (footnotes omitted):

"[T]here are two types of double taxation. In one kind, the same property or person is taxed in two states on two different theories. . . . In the other kind of double taxation, a single theory is applied in both states to tax the same person or property, but the two state governments disagree on a vital issue of fact. The *Worcester County Trust Co.* case falls into this class. Both states had the same law, that a death tax is levied only at the decedent's domicile and that a man has only one domicile. The only dispute was, where was that domicile?

"It is rather surprising that almost all the attacks on double taxation . . . have been directed at the first kind, because the second kind seems more unjust. . . . [I]t is highly unfair for both state governments to tell the taxpayer, 'You have to pay only one tax,' and then make him pay twice. The injustice of the situation is clearly brought out by the fact that the courts of each state regard the other state as acting unlawfully, and yet neither state gives the taxpayer any remedy."

(1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). It is only by moving from State to State that a taxpayer risks incurring multiple taxation based on conflicting determinations of domicile. While no single State can be charged with creating this risk, the fact of its existence cannot be defended. The threat of multiple taxation based solely on domicile simply is incompatible with the structural principles of a federal system recognizing as "fundamental" a constitutional right to travel.

C

By holding that multiple taxation based on domicile is prohibited by the Due Process Clause, the Court could lay the basis for resolution of disputes such as this one under the interpleader jurisdiction of the federal district courts. By alleging that state taxing officials threatened the estate with multiple liability, an administrator would state a colorable claim that the relevant state officers were acting outside of constitutional limits and thus that they were acting in their individual capacities under *Ex parte Young*, 209 U. S. 123 (1908). The Eleventh Amendment thus would not bar the suit under *Ex parte Young* and *Edelman* v. *Jordan*, and the interpleader requirement of competing claimants would be satisfied.

Professor Zechariah Chafee, the father of the federal interpleader statute, argued: "It is our federal system which creates the possibility of double taxation. Somewhere within that federal system we should be able to find remedies for the frictions which that system creates." Federal Interpleader Since the Act of 1936, 49 Yale L. J. 377, 388 (1940).

In my view the Due Process Clause provides the *right* to be free of multiple taxation of intangibles based on domicile. The Federal Interpleader Act provides the remedy.

As the Court holds otherwise, I respectfully dissent.

UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SADLOWSKI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81–395. Argued March 31, 1982—Decided June 14, 1982

Petitioner union amended its constitution to include an "outsider rule" which prohibits candidates for union office from accepting campaign contributions from nonmembers and creates a committee to enforce the rule, the committee's decisions being final and binding. Respondents, including a union member who had been an unsuccessful candidate for union office before adoption of the outsider rule and had received much of the financial support for his campaign from sources outside the union, filed suit against petitioner in Federal District Court, claiming that the rule prohibited nonmember contributions to finance campaign-related litigation and thus violated § 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), which provides that a union may not limit the rights of its members to institute an action in any court or administrative agency. The District Court found for respondents. The Court of Appeals affirmed, agreeing that the outsider rule violated § 101(a)(4). It also accepted respondents' argument, first raised on appeal, that the rule violated the "freedom of speech and assembly" provision of § 101(a)(2) of the LMRDA giving every union member the right to assemble freely with other members and to express at union meetings his views about candidates in union elections or any business properly before the meeting. The Court of Appeals rejected petitioner's argument that the outsider rule was protected by § 101(a)(2)'s proviso, which gives a union authority to adopt "reasonable" rules regarding its members' responsibilities.

Held:

1. Petitioner's outsider rule does not violate § 101(a)(2). Although it may interfere with rights Congress intended to protect, it is rationally related to a legitimate and protected purpose, and thus is sheltered by § 101(a)(2)'s proviso. Pp. 108–119.

(a) In light of the legislative history, § 101(a)(2) cannot be read as incorporating the entire body of First Amendment law so as to require that the scope of protections afforded union members by the statute coincide with the protections afforded by the Constitution as to a political election candidate's freedom to receive campaign contributions. Union

rules are valid under the statute so long as they are reasonable; they need not pass the stringent tests applied in the First Amendment context. Pp. 108–111.

(b) Congress adopted the freedom of speech and assembly provision of § 101(a)(2) in order to promote union democracy, particularly through fostering vigorous debate during election campaigns. Although petitioner's outsider rule does affect rights protected by the statute and may limit somewhat the ability of insurgent union members to wage an effective campaign against incumbent officers, as a practical matter the impact may not be substantial. The record shows that challengers have been able to defeat incumbents or administration-backed candidates, despite the absence of financial support from nonmembers. Pp. 111–115.

(c) Petitioner's purpose in adopting the outsider rule was to ensure that nonmembers would not unduly influence union affairs and that the union leadership would remain responsive to the membership. The policies underlying the LMRDA show that this is a legitimate purpose that Congress meant to protect. Nor is the rule invalid on the asserted ground that it is not rationally related to that purpose because the union could have simply established contribution ceilings, or need not have limited contributions by relatives and friends, or could have simply required that candidates reveal the sources of their funds. Petitioner had a reasonable basis for its decision to impose a broad ban seeking to eradicate the threat of outside influence. Pp. 115–119.

2. Petitioner's outsider rule does not violate § 101(a)(4)'s right-to-sue provision. The rule simply does not apply where a member uses funds from outsiders to finance litigation. Neither the rule's language nor the debates leading up to its passage indicate that petitioner intended the rule to apply in such context. Moreover, petitioner's rule-enforcement committee issued an opinion stating that the rule's limitations "do not apply to the financing of lawsuits by non-members for the purpose of asserting the legal rights of candidates or other union members in connection with elections." Pp. 119–121.

207 U. S. App. D. C. 189, 645 F. 2d 1114, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BRENNAN and BLACKMUN, JJ., joined, *post*, p. 121.

Michael H. Gottesman argued the cause for petitioner. With him on the brief were *Robert M. Weinberg* and *Laurence Gold.*

Joseph L. Rauh, Jr., argued the cause for respondents. With him on the brief were *John Silard*, *Joseph A. Yablonski*, and *Daniel B. Edelman.**

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we confront the question whether § 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 522, 29 U. S. C. § 411(a)(2), precludes the membership of a union from adopting a rule that prohibits candidates for union office from accepting campaign contributions from nonmembers. The United States Court of Appeals for the District of Columbia Circuit held that such a rule violated § 101(a)(2). 207 U. S. App. D. C. 189, 645 F. 2d 1114 (1981). We granted certiorari, 454 U. S. 962 (1981), and now reverse.

I

A

Petitioner United Steelworkers of America (USWA), a labor organization with 1,300,000 members, conducts elections for union president and other top union officers every four years. The elections for these officers are decided by referendum vote of the membership. In the 1977 election, which was hotly contested, two candidates ran for president: respondent Edward Sadlowski, Jr., the Director of USWA's largest district, and Lloyd McBride, another District Director.[1] Both Sadlowski and McBride headed a slate of candidates for the other top union positions.

McBride was endorsed by the incumbent union leadership, and received substantial financial support from union officers and staff. Sadlowski, on the other hand, received much of his financial support from sources outside the union. During the campaign, the question whether candidates should accept

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**Charles S. Sims* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

[1] The USWA is divided into 25 districts, which are headed by District Directors. District Directors are elected every four years by referendum vote of the members within each district. App. 7.

contributions from persons who were not members of the union was vigorously debated. The McBride slate contended that outsider participation in USWA elections was dangerous for the union. App. 27, n. 2, 298. See also *id.*, at 129, 398; see generally *id.*, at 40–48. McBride ultimately defeated Sadlowski by a fairly wide margin—57% to 43%. The other candidates on the McBride slate won by similar margins.

After the elections, union members continued to debate the question whether outsider participation in union campaigns was desirable. This debate was finally resolved in 1978, when USWA held its biennial Convention. The Convention, which consists of approximately 5,000 delegates elected by members of USWA's local unions, is USWA's highest governing body. At the 1978 Convention, several local unions submitted resolutions recommending amendment of the USWA Constitution to include an "outsider rule" prohibiting campaign contributions by nonmembers. The union's International Executive Board also recommended a ban on nonmember contributions. Acting on the basis of these recommendations, the Convention's Constitution Committee proposed to the Convention that it adopt an outsider rule. After a debate on the floor of the Convention, the delegates, by a margin of roughly 10 to 1, voted to include such a rule in the Constitution. *Id.*, at 35–36, 81–105.

The outsider rule, Article V, § 27, of the USWA Constitution (1978), provides in pertinent part:

> "Sec. 27. No candidate (including a prospective candidate) for any position set forth in Article IV, Section 1, and supporter of a candidate may solicit or accept financial support, or any other direct or indirect support of any kind (except an individual's own volunteered personal time) from any non-member."[2]

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[2] The offices set forth in Article IV, Section 1 of the USWA Constitution are International President, International Secretary, International Treasurer, International Vice President (Administration), International Vice

Section 27 confers authority upon the International Executive Board to adopt regulations necessary to implement the provision. It also creates a Campaign Contribution Administrative Committee, consisting of three "distinguished, impartial" nonmembers to administer and enforce the provision. The Committee may order a candidate to cease and desist from conduct that breaches § 27, and may declare a candidate disqualified. Its decisions are final and binding.

B

In October 1979, Sadlowski and several other individuals[3] filed suit against USWA in the United States District Court for the District of Columbia. They claimed, *inter alia*, that the outsider rule violated the "right to sue" provision of Title I of the LMRDA, § 101(a)(4), 73 Stat. 522, 29 U. S. C. § 411(a)(4), because it would prohibit a candidate from accepting nonmember contributions to finance campaign-related litigation. Both sides moved for summary judgment. The District Court found that the rule violated § 101(a)(4). 507 F. Supp. 623, 625 (1981). The District Court further decided to invalidate the rule *in toto*, because the portion of the rule that "limits meaningful access to the courts . . . cannot be separated or isolated from the rule in its entirety." *Ibid.*

The United States Court of Appeals for the District of Columbia Circuit affirmed. 207 U. S. App. D. C. 189, 645

President (Human Affairs), District Director for the 25 Districts, and a National Director for Canada.

[3] Other plaintiffs included Joseph Samargia, a USWA member and potential candidate for union office; Edward Sadlowski, Sr., a retired union member who campaigned for his son in 1977; Leonard S. Rubenstein, a nonmember who made contributions to Sadlowski, Jr., during the 1977 campaign; and James Miller, a nonmember who donated legal services during the 1977 campaign. Samargia alleged that he might run for union office in the 1981 elections. Sadlowski, Sr., Rubenstein, and Miller alleged that they might wish to contribute services or funds in future USWA elections. App. 5–6, 16. Each of these individuals is also a respondent here.

F. 2d 1114 (1981). The court agreed that Article V, § 27, violated the right-to-sue provision. However, it chose not to decide whether this violation alone justified an injunction restraining enforcement of the entire rule. It accepted respondents' argument, first raised on appeal, that the outsider rule also violated the § 101(a)(2) "freedom of speech and assembly" provision, and that this violation justified the injunction. The Court of Appeals reasoned that the statutory goal of union democracy could be achieved only if "effective challenges can be made to the often-entrenched union leadership." 207 U. S. App. D. C., at 197, 645 F. 2d, at 1122. But effective challenges are possible only if insurgent candidates can solicit contributions from outsiders. "Even without contribution limitations, challengers to the union leadership face substantial barriers, especially the electoral power of the union staff." *Id.*, at 196, 645 F. 2d, at 1121. The court rejected the union's argument that even if the rule interfered with rights protected by the statute, it was protected by the proviso to § 101(a)(2), which gives a union authority to adopt "reasonable" rules regarding the responsibilities of its members. *Id.*, at 198, 645 F. 2d, at 1123.

To buttress its analysis, the Court of Appeals relied heavily on its understanding of First Amendment jurisprudence. It stated that § 101(a)(2) places "essentially the same limits on labor unions with respect to outside campaign contributions that the First Amendment would if it applied to labor unions." *Id.*, at 195, 645 F. 2d, at 1120. Citing *Buckley* v. *Valeo*, 424 U. S. 1, 19 (1976) *(per curiam)*, the Court of Appeals suggested that contribution rules that prevent candidates for political office from amassing the resources necessary for effective advocacy are unconstitutional. By analogy, since the outsider rule would interfere with effective advocacy in union campaigns, it must violate § 101(a)(2). 207 U. S. App. D. C., at 197, 645 F. 2d, at 1122.

II

Section 101(a)(2) is contained in Title I of the LMRDA, the "Bill of Rights of Members of Labor Organizations." See 29 U. S. C. §§ 411–415. It provides:

> "FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 73 Stat. 522.

We must decide whether this statute is violated by a union rule that prohibits candidates for union office from accepting campaign contributions from individuals who are not members of the union.

A

At the outset, we address respondents' contention that this case can be resolved simply by reference to First Amendment law. Respondents claim that § 101(a)(2) confers upon union members rights equivalent to the rights established by the First Amendment. They further argue that in the context of a political election, a rule that placed substantial restrictions on a candidate's freedom to receive campaign contributions would violate the First Amendment. Thus, a rule that substantially restricts contributions in union campaigns must violate § 101(a)(2). We are not persuaded by this argu-

ment. In light of the legislative history, we do not believe that § 101(a)(2) should be read as incorporating the entire body of First Amendment law, so that the scope of protections afforded by the statute coincides with the protections afforded by the Constitution.

The legislation that ultimately evolved into Title I of the LMRDA was introduced on the floor of the Senate by Senator McClellan. The Senate Committee on Labor and Public Welfare had reported out a bill containing provisions that were the forerunners of Titles II through VI of the LMRDA. These provisions focused on specific aspects of union affairs: they established disclosure requirements and rules governing union trusteeships and elections. See S. 1555, 86th Cong., 1st Sess. (1959), 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 338–396 (1959) (Leg. Hist.); see also *Finnegan* v. *Leu*, 456 U. S. 431, 435–436 (1982). Senator McClellan and other legislators feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leadership. Senator McClellan therefore proposed an amendment that he described as a "Bill of Rights" for union members. This amendment, which contained the forerunner of § 101(a)(2), as well as the forerunners of other Title I provisions, was designed to guarantee every union member equal voting rights, rights of free speech and assembly, and a right to sue. 105 Cong. Rec. 6469–6493 (1959), 2 Leg. Hist. 1096–1119.

Senator McClellan hoped that the amendment would "bring to the conduct of union affairs and to union members the reality of some of the freedoms from oppression that we enjoy as citizens by virtue of the Constitution of the United States." 105 Cong. Rec. 6472 (1959), 2 Leg. Hist. 1098. He further stated: "[T]he rights which I desire to have spelled out in the bill are not now defined in the bill. Such rights are basic. They ought to be basic to every person, and they are,

under the Constitution of the United States." 105 Cong. Rec. 6478 (1959), 2 Leg. Hist. 1104–1105. Senator McClellan explained the freedom of assembly provision, in particular, as follows:

> "That [provision] gives union members the right to assemble in groups, if they like, and to visit their neighbors and to discuss union affairs, and to say what they think, or perhaps discuss what should be done to straighten out union affairs, or perhaps discuss the promotion of a union movement, or perhaps a policy in which they believe. They would be able to do all of that without being punished for doing it, as is actually happening today." 105 Cong. Rec. 6477 (1959), 2 Leg. Hist. 1104.

Other Senators made similar statements. See 105 Cong. Rec. 6483 (1959) (Sen. Curtis); *id.*, at 6488 (Sen. Goldwater); *id.*, at 6489 (Sen. Mundt); *id.*, at 6490 (Sen. Dirksen); *id.*, at 6726 (Sen. Javits); 2 Leg. Hist. 1109, 1115, 1116, 1238.

The McClellan amendment was adopted by a vote of 47–46. 105 Cong. Rec. 6492 (1959), 2 Leg. Hist. 1119. Shortly thereafter, Senator Kuchel offered a substitute for the McClellan amendment. This substitute added the proviso that now appears in § 101(a)(2), which preserves the union's right to adopt reasonable rules governing the responsibilities of its members. It was designed to remove "the extremes raised by the [McClellan] amendment," 105 Cong. Rec. 6722 (1959), 2 Leg. Hist. 1234 (Sen. Cooper), and to assure that the amendment would not "unduly harass and obstruct legitimate unionism." 105 Cong. Rec. 6721 (1959), 2 Leg. Hist. 1233 (Sen. Church). The Kuchel amendment was approved by a vote of 77–14. See 105 Cong. Rec. 6717–6727 (1959), 2 Leg. Hist. 1229–1239. The legislation was then taken up in the House of Representatives. The House bill, which contained a "Bill of Rights" identical to that adopted by the Senate, was quickly approved. H. R. 8400, 86th Cong., 1st Sess. (1959), 1 Leg. Hist. 628–633.

This history reveals that Congress modeled Title I after the Bill of Rights, and that the legislators intended § 101 (a)(2) to restate a principal First Amendment value—the right to speak one's mind without fear of reprisal. However, there is absolutely no indication that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment. Rather, Congress' decision to include a proviso covering "reasonable" rules refutes that proposition. First Amendment freedoms may not be infringed absent a compelling governmental interest. Even then, any government regulation must be carefully tailored, so that rights are not needlessly impaired. *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982). Union rules, by contrast, are valid under § 101(a)(2) so long as they are reasonable; they need not pass the stringent tests applied in the First Amendment context.

B

To determine whether a union rule is valid under the statute, we first consider whether the rule interferes with an interest protected by the first part of § 101(a)(2). If it does, we then determine whether the rule is "reasonable" and thus sheltered by the proviso to § 101(a)(2). In conducting these inquiries, we find guidance in the policies that underlie the LMRDA in general and Title I in particular. First Amendment principles may be helpful, although they are not controlling. We must look to the objectives Congress sought to achieve, and avoid "'placing great emphasis upon close construction of the words.'" *Wirtz* v. *Glass Bottle Blowers*, 389 U. S. 463, 468, and n. 6 (1968) (quoting Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960)); *Hall* v. *Cole*, 412 U. S. 1, 11, and n. 17 (1973).[4] The critical question is whether a rule

[4] Neither the language contained in the first part of § 101(a)(2), which describes the "right to meet and assemble freely," nor the language contained in the proviso, which states that unions may adopt "reasonable rules as to the responsibility of every member toward the organization as an in-

that partially interferes with a protected interest is nevertheless reasonably related to the protection of the organization as an institution.

Appyling this form of analysis here, we conclude that the outsider rule is valid. Although it may limit somewhat the ability of insurgent union members to wage an effective campaign, an interest deserving some protection under the statute, it is rationally related to the union's legitimate interest in reducing outsider interference with union affairs.

(1)

An examination of the policies underlying the LMRDA indicates that the outsider rule may have some impact on interests that Congress intended to protect under § 101(a)(2). Congress adopted the freedom of speech and assembly provision in order to promote union democracy. See *supra*, at 109–111; see also S. Rep. No. 187, 86th Cong., 1st Sess., 2 (1959), 1 Leg. Hist. 398; H. R. Rep. No. 741, 86th Cong., 1st Sess., 2 (1959), 1 Leg. Hist. 760. It recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal. Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in elections that members can wield their power, and directly express their approval or disapproval of the union leadership. See S. Rep. No. 187, *supra*, at 2–5, 7, 1 Leg. Hist. 398–401, 403; H. R.

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stitution," should be read narrowly. As we have already indicated, it seems clear that Congress intended the first part of § 101(a)(2) to be given a flexible interpretation. See *supra*, at 109–111; see also *infra*, at 112–113. And Congress adopted the proviso in order to ensure that the scope of the statute was limited by a general rule of reason. It indicated that the courts are to play a role in the determination of reasonableness. See 105 Cong. Rec. 6719 (1959) (Sen. Kuchel), 2 Leg. Hist. 1231; 105 Cong. Rec. 6726 (1959) (Sen. Javits), 2 Leg. Hist. 1238. See also *supra*, at 110. See generally 105 Cong. Rec. 6717–6727 (1959), 2 Leg. Hist. 1229–1239.

Rep. No. 741, *supra*, at 1–7, 15–16, 1 Leg. Hist. 759–765, 773–774.[5]

The interest in fostering vigorous debate during election campaigns may be affected by the outsider rule. If candidates are not permitted to accept contributions from persons outside the union, their ability to criticize union policies and to mount effective challenges to union leadership may be weakened. Restrictions that limit access to funds may reduce the number of issues discussed, the attention that is devoted to each issue, and the size of the audience reached. Cf. *Buckley* v. *Valeo*, 424 U. S., at 65–66 *(per curiam)* (First Amendment freedom of expression and association may be "diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective'").[6]

Although the outsider rule does affect rights protected by the statute, as a practical matter the impact may not be substantial. Respondents, as well as the Court of Appeals, suggest that incumbents have a large advantage because they can rely on their union staff during election campaigns. Challengers cannot counter this power simply by seeking funds from union members; the rank and file cannot provide

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[5] See also *Hall* v. *Cole*, 412 U. S. 1, 14 (1973) ("Title I of the LMRDA was specifically designed to protect the union member's right to seek higher office within the union"). Cf. *Wirtz* v. *Glass Bottle Blowers*, 389 U. S. 463, 470 (1968) (Title IV designed to ensure free and democratic elections).

[6] In several First Amendment cases, we have protected contribution and solicitation of the financial support necessary to further effective advocacy. See, *e. g.*, *Citizens Against Rent Control* v. *Berkeley*, 454 U. S. 290 (1981); *Village of Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978). These cases are not directly analogous, however. Contribution limitations potentially infringe the First Amendment rights of contributors as well as candidates. *Buckley* v. *Valeo*, 424 U. S., at 24–25 *(per curiam)*. Here, the nonmember *contributors* have no right of expression protected by the statute.

sufficient support. Thus, they must be permitted to seek funds from outsiders. In fact, however, the rank and file probably can provide support. The USWA is a very large union whose members earn sufficient income to make campaign contributions. See App. 118–120. Requiring candidates to rely solely on contributions from members will not unduly limit their ability to raise campaign funds. Uncontradicted record evidence[7] discloses that challengers have been able to defeat incumbents or administration-backed candidates, despite the absence of financial support from nonmembers. See *id.*, at 25, 118–119.[8]

In addition, although there are undoubtedly advantages to incumbency, see *Hall* v. *Cole*, 412 U. S., at 13, respondents and the Court of Appeals may overstate those advantages. Staff employees are forbidden by § 401(g) of the LMRDA, 29 U. S. C. § 481(g), and by internal USWA rules to campaign on union time or to use union funds, facilities, or equipment for campaign purposes. App. 110–117; see 29 CFR § 452.76 (1981). Staff officers have a contractual right to choose whether or not to participate in any USWA campaign with-

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[7] This case is here on cross-motions for summary judgment. We reach a conclusion opposite to that reached by the Court of Appeals—that the outsider rule is valid. In making this decision, we have assumed that all of the evidence submitted by respondents is true. In addition, we have relied on evidence submitted by the union only when it is uncontradicted.

Here, to support their claim that incumbents have a large advantage in union elections, respondents have submitted numerous affidavits. We do not intend to deny the existence of this advantage. For the purposes of our decision in this case, we think it sufficient to observe that there is uncontradicted evidence demonstrating that effective campaigns have been mounted by nonincumbents—and that the interference with interests protected by § 101(a)(2) is only partial.

[8] USWA has submitted evidence suggesting that the adoption of the outsider rule did not have an adverse effect on the 1981 election campaigns. A nonincumbent candidate for District Director in a relatively small district has testified that he had raised in excess of $30,000 from rank-and-file members as early as 15 months before the election. App. 121–123, 217–218. Respondents have not submitted any opposing evidence.

out being subjected to discipline or reprisal for their decision. See App. 107–110, 115–117, 228, 384–385. Indeed, USWA elections have frequently involved challenges to incumbents by members of the staff. Many of these challenges have been successful. *Id.*, at 108, 201–216.

The impact of the outsider rule on rights protected under § 101(a)(2) is limited in another important respect. The union has stated that the rule would not prohibit union members who are not involved in a campaign from using outside funds to address particular issues. That is, members could solicit funds from outsiders in order to focus the attention of the rank and file on a specific problem. The fact that union members remain free to seek funds for this purpose will serve as a counter to the power of entrenched leadership, and ensures that debate on issues that are important to the membership will never be stifled.

(2)

Although the outsider rule may implicate rights protected by § 101(a)(2), it serves a legitimate purpose that is clearly protected under the statute. The union adopted the rule because it wanted to ensure that nonmembers do not unduly influence union affairs. USWA feared that officers who received campaign contributions from nonmembers might be beholden to those individuals and might allow their decisions to be influenced by considerations other than the best interests of the union. The union wanted to ensure that the union leadership remained responsive to the membership. See App. 210; see also *id.*, at 61–62, 81–97, 275, 303, 304.[9] An

[9] Respondents allege that the rule was forced upon the union members by high union officers, who wanted to ensure that they were insulated from effective challenges in future elections. However, the record does not support respondents' claims. The outsider rule was adopted through democratic processes, and was favored by an overwhelming majority of the delegates to the 1978 Convention. See *supra*, at 105. These delegates had been elected by the rank and file. See App. 301–302.

examination of the policies underlying the LMRDA reveals that this is a legitimate purpose that Congress meant to protect.

Evidence that Congress regarded the desire to minimize outsider influence as a legitimate purpose is provided by the history to Title I. On the Senate floor, Senator McClellan argued that a bill of rights for union members was necessary because some unions had been "invaded" or "infiltrated" by outsiders who had no interest in the members but rather had seized control for their own purposes. 105 Cong. Rec. 6469–6474 (1959), 2 Leg. Hist. 1097–1100. He stated that the strongest support for the bill of rights provisions "should come from traditional union leaders. It will protect them from the assaults of those who would capture their unions." 105 Cong. Rec. 6472 (1959), 2 Leg. Hist. 1098. And he stated:

> "[Infiltration could be ended] by placing the ultimate power in the hands of the members, where it rightfully belongs, so that they may be ruled by their free consent, [and] may bring about a regeneration of union leadership. I believe the unions should be returned to those whom they were designed to serve; they should not be left to the hands of those who act as masters. The union must be returned to their members, to whom they rightfully belong." 105 Cong. Rec. 6472 (1959), 2 Leg. Hist. 1099.

It is true that Senator McClellan was particularly concerned about infiltration of unions by racketeers: he described situations in which "thugs and hoodlums" had taken over unions so that they could exploit the members for pecuniary gain. 105 Cong. Rec. 6471 (1959), 2 Leg. Hist. 1097. However, his statements also indicate a more general desire to ensure that union members, and not outsiders, control the affairs of their union.

Additional evidence that Congress regarded the union's desire to maintain control over its own affairs as legitimate is provided by the history of other sections of the LMRDA. In drafting Titles II through VI, Congress was guided by the general principle that unions should be left free to "operate their own affairs, as far as possible." S. Rep. No. 1684, 85th Cong., 2d Sess., 4–5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. Given certain minimum standards, "individual members are fully competent to regulate union affairs." *Ibid.* Thus, for example, in Title IV, which regulates the conduct of union elections, Congress simply set forth certain minimum standards. So long as unions conform with these standards, they are free "to run their own elections." *Wirtz* v. *Glass Bottle Blowers*, 389 U. S., at 471. Congress' desire to permit unions to regulate their own affairs and to minimize governmental intervention suggests that it would have endorsed union efforts to reduce outsider influence.

Indeed, specific provisions contained in Title IV provide support for our conclusion that the outsider rule serves a legitimate and protected purpose. Section 401(g), 29 U. S. C. § 481(g), prohibits the use of employer as well as union funds in election campaigns. This ban reflects a desire to minimize the danger that employers will influence the outcome of union elections. A union rule that seeks to reduce the influence of outsiders other than employers is clearly consistent with that goal. See also § 403 of Title IV of the LMRDA, 29 U. S. C. § 483 (authorizing unions to establish their own election rules).[10]

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[10] Section 403 provides: "No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by [Title IV]." 73 Stat. 534. The union argues that the

Respondents argue that even if the desire to reduce outside influence is a legitimate purpose, the rule is not rationally related to that purpose. They contend, first, that the union could simply have established contribution ceilings, rather than placing an absolute ban on nonmember contributions. However, USWA feared not only that a few individual nonmembers would make large contributions, but also that outsiders would solicit many like-minded persons for small contributions which, when pooled, would have a substantial impact on the election. This fear appears to have been reasonable. In the 1977 election, Sadlowski received a significant percentage of his campaign funds from individuals who made contributions after receiving mail solicitations signed by prominent nonmembers. App. 128–129, 350–353.

Respondents also contend that even if the union was justified in limiting contributions by true outsiders, it need not have limited contributions by relatives and friends. Again, however, the USWA had a reasonable basis for its decision to impose a broad ban. An exception for family members and friends might have created a loophole that would have made the rule unenforceable: true outsiders could simply funnel their contributions through relatives and friends. See *id.*, at 32. Cf. *Buckley* v. *Valeo*, 424 U. S., at 53, n. 59 (Congress could constitutionally subject family members to the same limitations as nonfamily members).

Finally, respondents contend that USWA could simply have required that candidates for union office reveal the sources of their funds. But a disclosure rule, by itself, would not have solved the problem. Candidates who received such funds might still be beholden to outsiders. A disclosure requirement ensures only that union members know about this

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outsider rule can be justified solely on the basis of this provision, since the rule is otherwise consistent with Title IV. We are not persuaded by this argument. Section 403 must be interpreted in light of the provisions of Title I, which were adopted precisely because Congress feared that Titles II through VI did not provide sufficient protection to union members. Thus, even if the rule satisfies § 403, it must also satisfy Title I.

possibility when they cast their votes. It does not eradicate the threat of outside influence.[11]

III

As an alternative basis for sustaining the result below, respondents ask this Court to hold that the outsider rule impermissibly encroaches upon a union member's right, guaranteed by § 101(a)(4) of the LMRDA, to institute legal proceedings, and that the appropriate remedy for this violation is an injunction striking down the rule *in toto*. However, unlike the District Court and the Court of Appeals, we do not believe that the union's rule violates the right-to-sue provision.

Section 101(a)(4) provides that a union may not "limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency." 29 U. S. C. § 411(a)(4). The outsider rule would clearly violate this provision if it prohibited union members from accepting financial or other support from nonmembers for the purpose of conducting campaign-related litigation. In our view, however, the outsider rule simply does not apply where a member uses funds from outsiders to finance litigation.

The language of the rule contains no reference to litigation. In addition, the debates leading up to the passage of the rule do not contain any indication that the union intended the rule to apply in this context. But what is most persuasive, the Campaign Contribution Administrative Committee[12]—which

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[11] Respondents also contend that the outsider rule is underinclusive, because it does not apply to local union elections. As USWA explains in an unrebutted affidavit, however, an outsider rule for local union elections was considered and rejected because outsiders generally have little interest in influencing local campaigns, and enforcing an outsider rule in such elections would be an administrative burden. App. 30–32.

[12] The three Committee members included former Secretary of Labor W. Willard Wirtz; David Lewis, professor at Carleton University; and Eric Springer, former Director of Compliance of the United States Equal Em-

was given authority to make final and binding interpretations of the outsider rule—has issued an opinion concerning the impact of the outsider rule on the right to sue. In this opinion, it holds that "the limitations imposed by Section 27 do not apply to the financing of lawsuits by non-members for the purpose of asserting the legal rights of candidates or other union members in connection with elections."[13] App. 455; see also *id.*, at 456–458.[14]

The Court of Appeals expressed concern about a regulation contained in the USWA's Elections Manual which provides that although the outsider rule "does not prohibit the candidate's use of financial support or services from non-members to pay fees for legal or accounting services performed in . . . securing . . . legal rights of candidates," it does prohibit "[a]ctivities which are designed to extract political gain from legal proceedings." *Id.*, at 495. According to the Court of Appeals, the reference to "activities" might include steps in

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ployment Opportunity Commission and Chairman of the Commission on Human Relations in Pittsburgh, Pa. *Id.*, at 37–38.

[13] The opinion further stated that it was

"confined to services which are in fact legal services customarily performed by lawyers. The Committee recognizes the possibility that any ruling which it makes in general terms and in response to a broad inquiry may be misconstrued or distorted in an attempt to rationalize political activities as 'legal services.' It will deal with these questions whenever they arise on a case-by-case basis." *Id.*, at 458.

[14] The Committee left open the question whether the outsider rule would apply to a lawsuit that is not a bona fide attempt to secure an adjudication of legal rights, but, rather, is motivated solely by a desire to promote a candidate's political campaign. *Ibid.* The USWA has urged the Committee not to impose such a ban unless it is clear that the rule would not deter bona fide lawsuits. *Id.*, at 245–246. It is arguable that such a rule might violate § 101(a)(4) if it had the unmistakable effect of deterring bona fide lawsuits by individuals who feared that the Committee might misjudge their motives and impose sanctions. However, the speculative possibility that the Committee will in the future apply the rule in a manner that deters bona fide lawsuits does not justify striking down the rule *in toto* at this time.

the legal proceedings themselves, and might prohibit outside assistance to finance a lawsuit even if it was brought in good faith, if it was designed to extract political gain. 207 U. S. App. D. C., at 194, 645 F. 2d, at 1119. USWA has explained, however, that this language is intended to cover only nonlitigation activities that in some way refer to litigation, such as mailing a flyer announcing a legal victory, or some information learned during discovery.[15] See *id.*, at 193–194, 645 F. 2d, at 1118–1119.[16]

IV

We hold that USWA's rule prohibiting candidates for union office from accepting campaign contributions from nonmembers does not violate § 101(a)(2). Although it may interfere with rights Congress intended to protect, it is rationally related to a legitimate and protected purpose, and thus is sheltered by the proviso to § 101(a)(2). We reverse the decision below and remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE BLACKMUN join, dissenting.

The question before us is what Congress intended when in 1959 it passed § 101(a)(2), the Bill of Rights provision of the LMRDA. That question is best answered by identifying the

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[15] The Court of Appeals refused to accept this construction. 207 U. S. App. D. C., at 194, 645 F. 2d, at 1119. However, it is consistent with the language of the regulation and is also supported by the Committee's opinion. See n. 14, *supra*, and accompanying text.

[16] Respondents also argue that the decision below can be affirmed on the ground that the outsider rule violates the First Amendment because it interferes with members' and nonmembers' constitutional rights of free speech and free association. However, the union's decision to adopt an outsider rule does not involve state action. See *Steelworkers* v. *Weber*, 443 U. S. 193, 200 (1979).

problem that Congress intended to solve by adopting the provision. The answer, in turn, is not at all difficult to discover.

After long and careful examination and hearings dealing with the labor union movement, Congress found that too often unions were run by entrenched, corrupt leaders who maintained themselves and discouraged challenge by any means available, including violence and threats.[1] As Senator McClellan explained: "[T]he records of our committee's investigations show over and over again that a rank-and-file member dare not risk any opposition to a corrupt or autocratic leadership. If he does so, he may be beaten, his family threatened, his property destroyed or damaged, and he may be forced out of his job—all of these things can happen and have happened." 105 Cong. Rec. 6472 (1959), 2 NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1098 (1958) (Leg. Hist.). And again: "Members had better not offer any competition. They

[1] The Court of Appeals in this case summarized these findings:

"Prior to the enactment of the LMRDA in 1959 the Select Senate Committee ferreted out widespread corruption, dictatorship and racketeering in a number of large international unions. The Committee found that the President of the Bakery and Confectionary *[sic]* Workers' International Union of America had 'railroaded through changes in the union constitution which destroyed any vestigial pretenses of union democracy.' Select Committee Report [S. Rep. No. 1417, 85th Cong., 2d Sess.] 129 [1958]. It reported that Dave Beck, General President of the International Brotherhood of Teamsters 'shamefully enriched himself at [the] expense [of the union members] and that in the final instance he capitulated to the forces within the union who promoted the interests of racketeers and hoodlums.' *Id.* at 84. The Committee likewise found Teamster officials joining with others to take over illegal gambling operations with an 'underworld combine,' *id.* at 38–39, and the top officers of the United Textile Workers of America avariciously misappropriating union funds, *id.* at 159. 'Democracy [was] virtually nonexistent' in the International Union of Operating Engineers because the union was ruthlessly dominated through 'violence, intimidation and other dictatorial practices.' *Id.* at 437. Practices in the Teamsters 'advanced the cause of union dictatorship.' *Id.* at 444. The Committee cited other similar instances of widespread abuses in its 462-page Report." 207 U. S. App. D. C. 189, 199, 645 F. 2d 1114, 1124 (1981) (footnote omitted).

had better not seek election. They had better not aspire to the presidency or the secretaryship, or they will be expelled or disciplined." 105 Cong. Rec. 6478 (1959), 2 Leg. Hist. 1104.

This was the problem that Congress meant to solve. As Senator McClellan stated, its goal was to end "autocratic rule by placing the ultimate power in the hands of the members, where it rightfully belongs so that they may be ruled by their free consent, may bring about a regeneration of union leadership. I believe the unions should be returned to those whom they were designed to serve; they should not be left to the hands of those who act as masters." 105 Cong. Rec. 6472 (1959), 2 Leg. Hist. 1099.

What Congress then did was to guarantee the union member's right to run for election, § 401(e), and to guarantee him freedom of speech and assembly. § 101(a)(2). There is no question, and the Court concedes as much, that the Act created statutory protection for the union member's right effectively to run for union office. Without doubt, § 101(a)(2) was not only aimed at protecting the member who speaks his mind on union affairs, even if critical of the leadership, but was also "specifically designed to protect the union member's right to seek higher office within the union." *Hall* v. *Cole*, 412 U. S. 1, 14 (1973). The LMRDA was a major effort by Congress "to insure union democracy." S. Rep. No. 187, 86th Cong., 1st Sess., 2 (1959). The chosen instrument for curbing the abuses of entrenched union leadership was "free and democratic union elections." *Steelworkers* v. *Usery*, 429 U. S. 305, 309 (1977). The abuses of "entrenched union leadership" were to be curbed, among other means, by the "check of democratic elections." *Wirtz* v. *Hotel Employees*, 391 U. S. 492, 499 (1968). These elections were to be modeled on the "political elections in this country." *Wirtz* v. *Hotel Employees*, *supra*, at 504; *Steelworkers* v. *Usery*, *supra*, at 309.

The member's right to run for office and to speak and assemble was to be subject to reasonable union rules, but the

reasonableness of a particular rule must surely be judged with reference to the paradigmatic situation that Congress intended to address by guaranteeing free elections: a large union with entrenched, autocratic leadership bent on maintaining itself by fair means or foul. We do not by any means suggest that the USWA had or has the characteristics that led to the enactment of § 101(a)(2), but it is clear that the section should be construed with reference to those unions with the kind of leadership that caused the congressional response. Such a leadership is not only determined to discourage opposition; it also has at its disposal all of the advantages of incumbency for doing so, including the facilities of the union. Those leaders have normally appointed the union staff, the bureaucracy that makes the union run. The staff is dependent upon and totally loyal to the leadership. It amounts to a built-in campaign organization that can be relied upon to make substantial contributions and to solicit others for more. Such a management is in control of the union's communication system and has immediate access to membership lists and to the members themselves. Obviously, even if the incumbents eschew violence, threats, or intimidation, mounting an effective challenge would be a large and difficult endeavor. And if those in office are as unscrupulous as Congress often found them to be, the dimensions of the task facing the insurgent are exceedingly large. But Congress intended to help the members help solve these very difficulties by guaranteeing them the right to run for office and to have free and open elections in the American tradition.

It is incredible to me that the union rule at issue in this case can be found to be a reasonable restriction on the right of Edward Sadlowski, Jr., to speak, assemble, and run for union office in a free and democratic election. The scope and stringency of the rule cannot be doubted. It forbids any candidate for union office and his supporters to solicit or accept financial support from any nonmember. The candidate cannot accept contributions from members of his family, rela-

tives, friends, or well-wishers unless they are members of the union. Retired members such as Edward Sadlowski, Sr., may not contribute; neither may members not in good standing. Even a fully secured loan from a nonmember with a standard rate of interest is forbidden under the rule. The rule goes even further. It forbids the acceptance of "any other direct or indirect support of any kind from any nonmember," except an individual's volunteered personal time.[2] The regulations issued under the rule clearly show that the union intends to prohibit, as far as it is within its power to do so, all nonmember contributions on behalf of a member running for union office. These regulations specify:

> "[W]hen prohibited support is contributed, there will be a presumption that it was accepted by the candidate or his

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[2] The regulations specify:

"'Financial Support' means a direct or indirect contribution where the purpose, object or foreseeable effect of the support is to influence the election of a candidate. Financial support includes, but is not limited to:

"1. Contributions of money, securities, or any material thing of value;

"2. Payments to or subscription for fund raising events of any kind (e. g. raffles, dinners, beer or cocktail parties and so forth);

"3. Discounts in the price or cost of goods or services, except to the extent that commercially established discounts are generally available to the customers of the supplier;

"4. Extensions of credit, loans, and other similar forms of finance, except when obtained in the regular course of business of a commercial lending institution and on such terms and conditions as are regularly required by such institutions; and

"5. The payment for the personal services of another person, or for the use of building or office space, equipment or supplies, or advertisements through the media." App. 492.

The regulations also explain that "[e]xamples of indirect support from nonmembers would include the contribution of cash to a member who in turn makes a contribution to a candidate; the donation of travel expenses, printing services, office supplies, office space, or of clerical, secretarial, or professional services used by a non-member in conjunction with his or her own volunteered service to a candidate; the distribution of election materials with the aid of a volunteer's paid staff; and the procuring of discounts." *Id.*, at 494.

> or her supporters, unless they have taken affirmative steps in good faith to dissuade the non-member from providing such support and have taken action to correct the effects of the prohibited support." App. 494.[3]

A candidate unable to rebut this presumption may be disqualified, fined, suspended, or expelled. This is a Draconian rule. How could any candidate "correct the effects of the prohibited support"? The rule thus goes far beyond the limitations on contributions approved in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), and severely limits expenditures as well. The candidate may actually be denied his statutory right to run for office because nonmembers have exercised their own First Amendment rights.

The impact of the rule with respect to Edward Sadlowski, Sr., illustrates the rigor of the rule. It prohibits him from contributing to the campaign of Edward Sadlowski, Jr., even though the elder Sadlowski is the father of the candidate, was a charter member of the USWA, remained a member for 32 years prior to his retirement, and receives a USWA pension, the terms of which are negotiated by USWA's officers.

Restrictions such as this are a far cry from the free and open elections that Congress anticipated and are wholly inconsistent with the way elections have been run in this country. The Court has long recognized the close relationship between the ability to solicit funds and the ability to express views. "[W]ithout solicitation, the flow of . . . information and advocacy would likely cease." *Village of Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620, 632 (1980).

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[3] The regulation continues:

"In such cases where prohibited support has been contributed, it is the candidate's obligation to contact immediately the non-member contributor, reject the prohibited support, return the contribution, insist that such support be discontinued, and take whatever action on his own or her own, or as directed by the Committee, may be necessary to eliminate any impact on the election. Full reports must be made to the Committee promptly." *Id.*, at 495.

See also *Schneider* v. *State*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 761 (1976); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 363 (1977).

In *Thomas* v. *Collins*, 323 U. S. 516 (1945), the Court held that the First Amendment barred enforcement of a state statute requiring a permit before soliciting membership in any labor organization. Solicitation and speech were deemed to be so intertwined that a prior permit could not be required. The Court conceded that the "collection of funds" might be subject to reasonable regulation, but concluded that such regulation "must be done and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly." *Id.*, at 540–541.

Specifically with regard to elections and campaign financing, the Court observed in *Buckley* v. *Valeo*, *supra*, at 19:

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event." (Footnote omitted.)

Thus, as the Court of Appeals recognized in this case "'contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.'" 207 U. S. App. D. C. 189, 197, 645 F. 2d 1114, 1122 (1981), quoting 424 U. S., at 21.

It goes without saying that running for office in a union with 1.3 million members spread throughout the United

States and Canada requires a substantial war chest if the campaign is to be effective and to have any reasonable chance of succeeding. Attempting to unseat the incumbents of union office is a substantial undertaking. As we noted in *Steelworkers* v. *Usery*, 429 U. S., at 311, there is no permanent opposition party within the union. There is only a one-party system consisting of the union's incumbent officers and hired staff all controlled from the top down. "[T]he full-time officers collectively, under the direction of the top officer, constitute the sole political machine for the preservation of their offices and power." J. Edelstein & M. Warner, Comparative Union Democracy 39 (1979). The union involved in this case has some 30 elected positions, its president appoints more than 1,500 office and field staff, and salaries and expenses for union personnel in 1978 totalled over $37 million. App. 141.

Thus, in the best of circumstances, the role of the challenger is very difficult. And if one keeps in mind that Congress intended to give the challenger a fair chance even in a union controlled by unscrupulous leaders with an iron grip on the staff and a willingness to employ means both within and without the law, it is wholly unrealistic to confine the challenger to financial support garnered within the union. Surely, Congress never intended that a union should be permitted to impose such a limitation. As Clyde Summers, a recognized authority in this field, stated in this case on behalf of Sadlowski:

> "Opposition candidates customarily finance their campaigns in the first instance out of their own pockets and out of loans or gifts from friends. They get contributions from sympathetic union members, but at the beginning they may have few open supporters and they do not have a large organization to solicit contributions. They have to do enough publicizing and campaigning to make themselves appear as a viable candidate before they begin to get support from any substantial number of mem-

bers. Even then, the individual contributions of members is inevitably small. Seldom is it enough to mount a really substantial campaign, and it is almost never enough to match the resources of the incumbents." *Id.*, at 156.

"In my opinion, the practical effect of prohibiting all contributions to union election campaigns except those made by union members would be to gravely damage if not destroy the possibility of democratic elections in unions, particularly in large local unions and in international unions. . . .

"If opposition groups are barred from getting any help from the outside, they can, in most situations, have no hopes of mounting an effective campaign." *Id.*, at 160.[4]

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[4]The following is a summary of other relevant views presented by Mr. Summers, *id.*, at 152–160:

Incumbents in unions elections have four crucial advantages:

"First, and most important, they have control of the paid staff of representatives or business agents who provide the back-bone of the incumbents' political organization. The paid staff owe their jobs to the officers, take orders from the officers, and can be dismissed by the officers. . . . Second, the incumbent officers have control of the union newspaper. There is no such thing as a free and independent press within the union. . . . Third, the incumbents have ready access to members." They have immediate access to names, addresses and telephone numbers of union members. "The law requires equal access to membership lists but there is no practical equality when the incumbent administration includes the secretary treasurer of the union. Fourth, the officers have access to legal services, at the union's expense."

"These advantages are critical when one considers the financing of union election campaigns. . . . [T]he incumbent officers have a paid built-in campaign organization in the paid staff representatives. . . . In short, the incumbents can run a campaign with little or no money," while the opposition must have substantial funds even to get started. For incumbents, the largest single source is the paid staff, and it is quite unrealistic to expect opposition candidates to obtain substantial support from staff representatives who are contributing to those to whom they owe their jobs. Incumbents also raise funds from union members, and in doing so they have a marked advantage over insurgent candidates. Incumbents also raise

In addressing itself to union elections, Congress forbade union and employer contributions, but went no further in restricting contributions or expenditures to or on behalf of union candidates for office. The majority emphasizes that Congress was concerned about the control of unions by outsiders and asserts that the challenged rule serves the congressional purpose. It is true, as Senator McClellan explained, that "impositions and abuses . . . have been perpetrated upon the working people of many of our States by the thugs who have muscled into positions of power in labor unions and who masquerade as labor leaders and as friends of working people. . . ." 105 Cong. Rec. 6470 (1959), 2 Leg. Hist. 1097. But the remedy which he proposed and which was adopted was to end "autocratic rule by placing the ultimate power in the hands of the members," 105 Cong. Rec. 6472 (1959), 2 Leg. Hist. 1099, and by giving them sufficient statutory protection to participate in a fair election to unseat an entrenched leadership.

Yet the majority somehow finds the absolute, unbending, no-contribution rule to be a reasonable regulation of a member's right to seek office and of the free and open elections that Congress anticipated. This, in spite of the availability of other means to satisfy the union's legitimate concerns about outsiders controlling their affairs through those whose campaigns they have financed. A requirement of disclosure of all contributions, together with a ceiling on contributions,

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funds through testimonial dinners given in their honor. Opposition candidates cannot successfully match this effort.

"Union candidates' acceptance of money and other help from sources outside the union is a common and accepted practice. . . . Up until the last two years, no one, and I would emphasize no one, seriously suggested that there was anything inappropriate about union candidates soliciting financial support from non-members. . . . Union constitutions placed no such restrictions on such contributions. . . . Only within the last two years has the Steelworkers placed such a restriction in its constitution and this seems to be part of an effort of the administration to void any effective challenge by an opposition candidate in the future."

would avoid outside corruption without trampling on the rights of members to raise reasonable sums for election campaigns. Such rules would honor both purposes of the legislation: protecting against outside influence and empowering members to express their views and to challenge established leadership. As I see it, the rule at issue contradicts the values the statute was designed to protect and thwarts its purpose.

I respectfully dissent.

BLUM, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* BACON ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81–770. Argued April 28, 1982—Decided June 14, 1982

New York's Emergency Assistance (EA) Program, which is federally funded under the Social Security Act (SSA), precludes the furnishing of EA cash to persons receiving or eligible for Aid to Families with Dependent Children (AFDC) or of EA in any form to replace a lost or stolen AFDC grant. Appellees, who had been denied EA under these state provisions, brought a class action in Federal District Court to enjoin enforcement of the provisions, alleging that they conflicted with the SSA and violated equal protection. Ultimately, on remand after its decision invalidating the state provisions under the Supremacy Clause had been vacated by the Court of Appeals, the District Court invalidated the no-cash provision as a violation of equal protection but upheld the loss-or-theft provision. On a second appeal, the Court of Appeals held that both provisions violated the Equal Protection Clause of the Fourteenth Amendment.

Held: Because the New York provisions conflict with a valid federal regulation promulgated by the Secretary of Health, Education, and Welfare (Secretary) which proscribes inequitable treatment of individuals or groups under an EA program, they are invalid under the Supremacy Clause. Pp. 137–146.

(a) Reliance on the SSA to find the New York provisions invalid is not foreclosed by *Quern* v. *Mandley*, 436 U. S. 725. While *Quern* emphasized that a State retains considerable flexibility in determining which emergencies to cover under its EA plan, it was not suggested that the Secretary was stripped of all authority to review a plan that arbitrarily or inequitably excluded a class of recipients. Pp. 138–139.

(b) The Secretary's decision to apply the "equitable treatment" regulation so as to forbid a State to exclude AFDC recipients from its EA program is eminently reasonable and deserves judicial deference, especially where the legislative history leaves no doubt that AFDC recipients were expected to be included in a state EA program. Pp. 139–145.

648 F. 2d 801, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Robert S. Hammer, Assistant Attorney General of New York, argued the cause for appellant. With him on the brief were *Robert Abrams*, Attorney General, and *Shirley Adelson Siegel*, Solicitor General.

Martin A. Schwartz argued the cause for appellees. With him on the brief was *Eileen R. Kaufman*.

JUSTICE MARSHALL delivered the opinion of the Court.

New York has established an Emergency Assistance Program that receives substantial federal funding under Title IV–A of the Social Security Act (Act), 42 U. S. C. § 603(a)(5). The program excludes recipients of Aid to Families with Dependent Children (AFDC) from emergency assistance in the form of cash. It also excludes public assistance recipients (including AFDC recipients) from reimbursement for lost or stolen grants, even though it provides such reimbursement to other public benefit recipients. The United States Court of Appeals for the Second Circuit held that New York's treatment of AFDC recipients is not inconsistent with the federal Act and regulations but violates the Equal Protection Clause. Because we conclude that the New York law is invalid under the Act, we affirm without reaching the equal protection issue.

I

Appellee Jeanne Bacon has two minor children and depends entirely on an AFDC grant to support her family. On June 1, 1977, while she was shopping, her wallet and food stamps were stolen. She promptly reported the theft to the police and to the New York Department of Social Services (DSS). She requested emergency assistance (EA) under the State's federally funded Emergency Assistance Program, explaining that she had no money to purchase food and other essential items for her household for the month. DSS denied her request on the basis of a recent state law which precludes the furnishing of any cash EA to persons receiving or eligible

for AFDC, N. Y. Soc. Serv. Law §§ 350–j(2)(c) and (3) (McKinney Supp. 1981) (the "no-cash" provision), or of EA in any form to replace a lost or stolen public assistance grant, including an AFDC grant. § 350–j(2)(e) (the "loss-or-theft" provision).[1] Appellee Gertrude Parrish suffered a similar fate. An AFDC mother, she lost her food and AFDC funds when her apartment was broken into and ransacked. She applied for EA, and DSS denied her request on the same basis as it denied relief to appellee Bacon. The other named appellees, Linda Selders and Freddie Mae Goodwine, also

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[1] New York Soc. Serv. Law § 350–j (McKinney Supp. 1981) provides in pertinent part:

"2. For purposes of this section, the term 'emergency assistance' means aid, care and services authorized during a period not in excess of thirty days in any twelve month period to meet the emergency needs of a child or the household in which he is living, in the following circumstances:

"(a) where the child is under twenty-one years of age; and

"(b) the child is living with, or within the previous six months has lived with, one or more persons specified in subdivision b of section three hundred forty-nine of this chapter; and

"(c) *in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children;* and

"(d) such emergency needs resulted from a catastrophic occurrence or from a situation which threatens family stability and which has caused the destitution of the child and/or home; and

"(e) such occurrence or situation could not have been foreseen by the applicant, was not under his control, *and, in the case of a person receiving public assistance, did not result from the loss, theft or mismanagement of a regular public assistance grant;* and

"(f) the emergency grant being applied for will not replace or duplicate a public assistance grant already made under section one hundred thirty-one-a of this chapter.

"3. Emergency assistance to needy families with children shall be provided to the extent of items of need and services set forth in sections one hundred thirty-one and one hundred thirty-one-a of this chapter . . . . *Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services,* and so long as federal aid remains available, for emergency fuel grants in the form of vendor restricted payments" (emphasis added).

were denied EA after they cashed their AFDC checks and suffered the loss of their money.[2]

Appellees brought this class action to enjoin enforcement of the state law insofar as it denies EA pursuant to the no-cash provision and the loss-or-theft provision.[3] Appellees argued that the law conflicts with the Act and violates equal protection because it arbitrarily discriminates against AFDC recipients: it provides cash EA to all eligible recipients other than AFDC recipients, and provides EA for lost or stolen public benefit grants to all public benefit recipients (such as recipients of social security and Supplemental Security In-

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[2] The record indicates that appellees have standing to challenge the no-cash as well as the loss-or-theft provision. In the case of appellees Bacon, Parrish, and Goodwine, DSS purported to rely on the loss-or-theft provision in denying EA. However, Parrish was denied EA for lost food as well as lost money. The no-cash provision, not the loss-or-theft provision, would appear to justify denial of EA for the lost food, since that loss did not result from the theft of her public assistance *grant*.

In the case of appellee Selders, DSS denied EA for her lost cash pursuant to an administrative memorandum that outlines both the no-cash and the loss-or-theft exclusions for AFDC recipients. App. 34a–37a, 51a. It is therefore unclear which exclusion the State purported to rely upon in denying assistance. However, Selders lost a food stamp voucher as well as the cash from her AFDC grant. DSS refused to provide the cash equivalent of the voucher. Although DSS replaced the voucher, Selders was unable to make use of the replacement because she had no cash. *Bacon* v. *Toia*, 437 F. Supp. 1371, 1376–1377 (SDNY 1977). Accordingly, it was the State's no-cash rule that prevented her from obtaining effective EA. *Id.*, at 1384–1385. Selders alone was denominated a representative of the subclass of plaintiffs challenging the no-cash rule. *Id.*, at 1381.

In light of these facts and appellant's concession that DSS relied upon both the no-cash and the loss-or-theft provisions in denying assistance, Brief for Appellant 6–7; Tr. of Oral Arg. 4, 17, we conclude that appellees have standing to challenge both provisions.

[3] Appellees also sought to enjoin enforcement of the statutory provision denying replacement or duplication of a public assistance grant already made. N. Y. Soc. Serv. Law § 350–j(2)(f) (McKinney Supp. 1981). They no longer seek relief with respect to that provision because the District Court determined that the provision does not preclude EA in the event of a true emergency. *Bacon* v. *Toia*, 493 F. Supp. 865, 875 (SDNY 1980).

come) other than those on public assistance (including AFDC recipients).

The United States District Court for the Southern District of New York granted summary judgment in favor of appellees on the ground that the state provisions impermissibly narrowed the eligibility standards imposed on state EA programs by § 406(e) of the Act, 42 U. S. C. § 606(e),[4] and were thus invalid under the Supremacy Clause. *Bacon* v. *Toia*, 437 F. Supp. 1371 (1977). The United States Court of Appeals for the Second Circuit affirmed. *Bacon* v. *Toia*, 580 F. 2d 1044 (1978). Shortly thereafter, this Court decided *Quern* v. *Mandley*, 436 U. S. 725 (1978), in which we held that § 406(e) imposes permissive, not mandatory, standards on participating States. The Court of Appeals granted a motion for rehearing, vacated the judgment of the District Court, and remanded the case for further consideration in

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[4] Section 406(e) of the Act provides in part:

"(1) The term 'emergency assistance to needy families with children' means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is . . . living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved as necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

"(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

"(B) such services as may be specified by the Secretary;

"but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

"(2) Emergency assistance as authorized under paragraph (1) may be provided . . . to migrant workers with families in the State or in such part or parts thereof as the State shall designate." 81 Stat. 893.

light of *Quern*. On remand, the District Court changed its prior decision and held that the New York law was not inconsistent with the federal Act. In a subsequent opinion, the District Court invalidated the no-cash provision as a violation of equal protection but upheld the loss-or-theft provision. *Bacon* v. *Toia*, 493 F. Supp. 865 (1980). On the second appeal, the Court of Appeals agreed with the District Court that our decision in *Quern* foreclosed a finding that the law violates the Supremacy Clause. The Court of Appeals concluded, however, that both the no-cash and loss-or-theft provisions violate equal protection. *Bacon* v. *Toia*, 648 F. 2d 801 (1981). We noted probable jurisdiction. 454 U. S. 1122.

II

Where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily we first address the statutory argument in order to avoid unnecessary resolution of the constitutional issue. See *Califano* v. *Yamasaki*, 442 U. S. 682, 692–693 (1979); *Hagans* v. *Lavine*, 415 U. S. 528, 543 (1974).[5] We conclude that this case may be resolved

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[5] Appellant argues that the statutory issue is not properly before us. It is well accepted, however, that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below. See *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U. S. 479 (1976) *(per curiam)*; *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419 (1977); see also R. Stern & E. Gressman, Supreme Court Practice 478 (5th ed. 1978). Moreover, the statutory issue was raised and decided in both the District Court and the Court of Appeals.

Appellant also asserts that the appellees were required to file a cross-appeal because they seek to modify the judgment below. Acceptance of the appellees' statutory argument will allegedly result in such a modification because "the injunction granted below on the basis of constitutional right would be modified to one based upon statute or regulation." Reply of Appellant to Motion to Affirm 8. Appellant cites no authority for this novel view that an affirmance which does not alter the relief ordered in the judgment below "modifies" the judgment simply because the affirmance rests on a different legal basis than the court below adopted.

on statutory grounds. As we explain below, the New York no-cash and loss-or-theft rules conflict with valid federal regulations promulgated by the Secretary of Health, Education, and Welfare (Secretary) (now the Secretary of Health and Human Services) which proscribe inequitable treatment under the EA program. Thus, New York's rules are invalid under the Supremacy Clause.

A

Before reviewing the federal regulations that we find to be dispositive of this case, we first address appellant's claim that reliance on the Act is foreclosed by our decision in *Quern* v. *Mandley*, *supra*. In that case, we carefully reviewed the nature and scope of the EA program and examined one aspect of its relationship to the AFDC program.[6] Under Title IV–A of the Act, state public assistance plans approved by the Secretary are eligible for federal financial assistance. AFDC is a major categorical aid program funded under the Act—indeed, it is "the core of the Title IV–A system." *Id.*, at 728. States are required, as a condition of federal funding under the AFDC program, to make assistance available to all persons who meet statutory eligibility criteria. *Id.*, at 740; 42 U. S. C. §§ 602(a)(10), 606(a). The EA program is a supplement to such categorical assistance programs as AFDC. It permits federal reimbursement to States which choose to provide for temporary emergency assistance in their Title IV–A plans. 42 U. S. C. § 603(a)(5). In contrast to AFDC, the EA program establishes much broader eligibility standards and is not limited to persons eligible for AFDC. 42 U. S. C. § 606(e).

Plaintiffs in *Quern* made the broad claim that a State participating in the federal EA program may not limit eligibility for EA more narrowly than the federal eligibility standards in § 406(e). The state plan at issue provided emergency as-

[6] For a general discussion of the EA and AFDC programs, see *Quern* v. *Mandley*, 436 U. S., at 728–729, 735–736, 739, 742–743.

sistance only to certain AFDC families who were without shelter and to applicants presumptively eligible for AFDC who were in immediate need of clothing or household furnishings. We rejected the plaintiffs' broad claim and held that unlike the AFDC program, § 406(e) establishes only permissive, not mandatory, eligibility standards.

Quern did not address the statutory issue before us today—whether the complete and automatic exclusion of AFDC recipients from a State's EA program is inconsistent with the Act and applicable regulations. The Court had no occasion to consider the question, since the EA program in that case included *only* AFDC recipients. In addition, the only pertinent federal regulations in *Quern* undermined the plaintiffs' claims and supported the State's rules. See 436 U. S., at 743–744, n. 19; 45 CFR § 233.120 (1981). Here, on the other hand, the Secretary has promulgated a regulation inconsistent with New York's no-cash and loss-or-theft rules. See 45 CFR § 233.10 (1981); *infra*, at 139–142.[7] In short, although we emphasized in *Quern* that a State retains considerable flexibility in determining which emergencies to cover under its EA plan, we hardly suggested that the Secretary had been stripped of all authority to review a plan that arbitrarily or inequitably excluded a class of recipients.

B

The Secretary, who is charged with administering federal funding for EA under the Act, has promulgated the following regulation applicable to state plans under Title IV–A, including EA programs:

> "(a) *State plan requirements.* A State plan under title I, IV–A, X, XIV, or XVI, of the Social Security Act must:

[7] In a footnote, the Court reported that some States have narrowed eligibility for EA programs by excluding AFDC recipients if the emergency need is one theoretically covered by the basic assistance grant. *Id.*, at 739–740, n. 16. This descriptive statement is not, of course, an expression of opinion, much less a holding, with respect to the issue before us.

> "(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 CFR § 233.10 (1981).

The Secretary has also issued regulations exclusively addressed to the EA program. 45 CFR § 233.120 (1981).[8]

On the authority of these regulations, the Secretary has specifically required the inclusion of AFDC recipients in any EA program, and has disapproved New York's EA plan because it excludes AFDC recipients as a class. Shortly after this Court's decision in *Quern*, the Office of Family Assistance of the Social Security Administration issued Action Transmittal SSA–AT–78–44 (OFA) addressed to state agencies administering approved public assistance programs. The Transmittal explains that after *Quern*, "States remain free, under Federal policy to develop their own definition of

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[8] These regulations were adopted pursuant to § 1102 of the Act, 42 U. S. C. § 1302, which provides the Secretary with authority to "make . . . such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which [he] is charged under this chapter." We have described this provision as creating "broad rule-making powers." *Thorpe* v. *Housing Authority*, 393 U. S. 268, 277, n. 28 (1969). The Secretary has also argued that 45 CFR § 233.10(a)(1) (1981) is authorized pursuant to § 402(a)(5), 42 U. S. C. § 602(a)(5), under which a state plan under Title IV–A "must . . . provide such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan." See App. to Motion to Affirm 8a. This section applies to all portions of a state plan under Title IV–A, including the EA program. See *Quern*, *supra*, at 741–742.

the kind of emergencies they will meet under this program." App. 173a. Nevertheless, "*[a] State Plan must clearly specify that AFDC recipients are included in its EA program.* Other categories of needy families with children may be included at State option; these categories must be specified in the plan." *Id.*, at 174a (emphasis added). In an *amicus* brief filed at the invitation of the Court of Appeals below, the Secretary confirmed that New York's exclusion of AFDC recipients through its no-cash and loss-or-theft provisions violates federal regulations, in particular the "equitable treatment" regulation, 45 CFR § 233.10 (1981). App. to Motion to Affirm 12a–17a. As the Secretary interpreted that regulation, the discrimination in New York's program is not justified by, or tailored to, the purposes of the EA program. *Ibid.*[9]

We agree that New York's law is invalid under the equitable-treatment regulation insofar as it automatically excludes AFDC recipients from the EA program. The regulation, and the Secretary's decision to apply it to strike down New York's no-cash and loss-or-theft rules, clearly deserve judicial deference. We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference. See, *e. g.*, *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27 (1981);

[9] It appears that the Secretary has consistently taken the position that automatic exclusions of AFDC recipients from an EA program violate the "equitable treatment" regulation, 45 CFR § 233.10 (1981). In an *amicus* brief filed at the invitation of the court in *Ingerson* v. *Pratt*, Civ. Action No. 76–3255–S (Mass., Nov. 14, 1979), the Secretary stated that the regulation applies to EA programs. The Office of Family Assistance later determined that Massachusetts' "recipient status" rule violates the regulation because it provides that the EA benefits available to AFDC recipients will be affected by the amount received in the AFDC grant, whereas the EA benefits available to non-AFDC recipients will not be affected by the amount of assistance received. Documentation of the U. S. Dept. of HEW relating to *Ingerson* v. *Pratt*, File of the Clerk of this Court in No. 81–770. The District Court has invalidated this rule (as well as another state rule) based on the "equitable treatment" regulation. *Ingerson* v. *Pratt*, Civ. Action No. 76–3255–S (Mass., Feb. 8, 1982).

Quern, 436 U. S., at 738. In light of the strong support in the legislative history for the Secretary's conclusion that the automatic exclusion of AFDC recipients from an EA program is inequitable in light of the purposes of the EA program, we find such deference particularly appropriate in this case.

C

In 1967, Congress thoroughly revised the Social Security Act, including many of its public assistance provisions. The House and Senate Committee Reports concerning the portion of the revision that would ultimately become the EA program[10] make it unmistakably clear that AFDC recipients were expected to benefit from the program. The initial House Report states:

> "Your committee understands that the process of determining eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction, or when utilities are turned off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today.

[10] The EA program, a small part of the 1967 Social Security Amendments, originated with the President's limited proposal to extend temporary assistance to migratory workers. See H. R. 5710, 90th Cong., 1st Sess., 122–123 (1967). The assistance "would be in an amount consistent with what the individuals would receive if they were eligible under a public assistance plan in the State in which they are living." House Committee on Ways and Means, Section-by-Section Analysis of H. R. 5710, 90th Cong., 1st Sess., 9 (Comm. Print 1967). In the House, the Ways and Means Committee adopted a much broader proposal, very similar to the version ultimately enacted. See H. R. 12080, 90th Cong., 1st Sess., 137–139 (1967). After House passage, the Senate made three changes—increasing the amount of time that emergency assistance would be available, denying assistance if a child or relative refused without good cause to accept employment, and more explicitly protecting migrant workers. In conference, the second and third changes were accepted. H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., 60 (1967). Congress adopted the conference bill.

> When a child is suddenly deprived of his parents by their accidental death or when the agency finds that the conditions in the home are contrary to the child's welfare, the normal methods of payment have to be suspended while new arrangements and court referrals are made.
>
> "To encourage public welfare agencies to move promptly and with maximum effectiveness in such situations, the bill contains an offer to the States of 50-percent participation in emergency assistance payments. . . . The eligible families involved are those with children under 21 who either are or have recently been living with close relatives. *The families do not have to be receiving or eligible upon application to receive AFDC (although they are generally of the same type)*, but they must be without available resources . . . .
>
> "Assistance might be in any form . . . . The provision is broad enough that emergencies can be met in migrant families *as well as those meeting residence requirements of the State's AFDC program.* Its utilization would be optional with the States." H. R. Rep. No. 544, 90th Cong., 1st Sess., 109 (1967) (emphasis added).

This passage leaves the obvious implication that persons who are eligible for AFDC benefits would receive EA. The Senate Report is almost identical, except for an explanation of the changes in the Senate bill. S. Rep. No. 744, 90th Cong., 1st Sess., 165–166 (1967).[11] Indeed, in an earlier summary of this provision, the Senate Report describes EA as one of a series of amendments that "would set up new protections for the children in AFDC families." *Id.*, at 146.[12]

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[11] The Senate Report also inserts "AFDC" prior to the word "eligibility" in the first sentence quoted in the text above—yet another indication that those eligible for or receiving AFDC were presumed to be covered.

[12] Other portions of the legislative documents indicate that the EA program was viewed as an extension of the AFDC program. For example, the House bill initially contained the title, "Emergency Assistance for Certain Needy *Families with Dependent Children.*" H. R. 12080, 90th

The House and Senate debates on this portion of the Social Security Amendments, although abbreviated, buttress our understanding of congressional intent. Senator Long, floor manager of the bill, repeated the Senate Report's characterization of EA as one of several changes that would establish "new protections for the children in AFDC families." 113 Cong. Rec. 32592 (1967). Comments by other legislators reveal a similar understanding.[13] Testimony by witnesses and statements introduced at the Senate hearings on the bill are also illuminating. Many statements assume that AFDC would be covered, and some reveal the belief that EA would be principally an AFDC program.[14]

Cong., 1st Sess., 137 (1967) (emphasis added). The bill as enacted placed the EA provisions within Subchapter IV–A of the Social Security Act, 42 U. S. C. § 601 *et seq.*, entitled "Aid to Families With Dependent Children." 42 U. S. C. §§ 603(a)(5), 606(e). Moreover, numerous historical documents place discussion of the EA program within an "AFDC" category. See, *e. g.*, H. R. Rep. No. 544, 90th Cong., 1st Sess., 97 (1967); Senate Committee on Finance, Social Security Amendments of 1967: Comparison of H. R. 12080, As Passed by the House of Representatives with Existing Law, 90th Cong., 1st Sess., 37–38 (Comm. Print 1967); S. Rep. No. 744, 90th Cong., 1st Sess., 4, 165–166 (1967); Senate Committee on Finance, The Social Security Amendments of 1967, Brief Summary of Major Provisions and Detailed Comparison with Prior Law, 90th Cong., 1st Sess., 68–69 (1968).

[13] Congress expressed concern that categorical aid programs (which include AFDC) were often too inflexible to afford immediate emergency relief. The implicit assumption is that if a state EA plan covered emergency needs that were not promptly met under these programs, persons receiving or eligible for aid under the programs would receive EA. Thus, Senator Ribicoff emphasized that welfare agencies need to have "flexibility" in dealing with emergencies; and Senator Curtis explained that "[f]or a period of 30 days, emergency assistance can be paid in cases where [EA recipients] cannot meet other qualifications." 113 Cong. Rec. 32853, 36319 (1967).

[14] Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., 1034 (1967) (statement of Commissioner, Louisiana Dept. of Public Welfare); *id.*, at App. A8 (statement of Commissioner, Ala-

III

The Secretary's decision to apply the "equitable treatment" regulation so as to forbid a State to exclude AFDC recipients from its EA program is eminently reasonable and deserves judicial deference. The regulation explicitly forbids the "inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 CFR § 233.10 (1981). AFDC recipients are "the core of the Title IV–A system," *Quern*, 436 U. S., at 728, and the principal group of beneficiaries under federally assisted state welfare programs. Moreover, the legislative history reviewed above leaves no doubt that AFDC recipients were expected to be included in a state EA program receiving federal financial assistance.

Because New York's no-cash[15] and loss-or-theft rules con-

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bama Dept. of Pensions and Security); *id.*, at App. A125 (statement of Governor of Hawaii); *id.*, at App. A289 (statement of Rhode Island Dept. of Social Welfare).

[15] Appellant asserts that the no-cash rule does not discriminate against AFDC recipients at all. On its face, of course, the rule excludes AFDC as well as all other public assistance recipients and thus violates the regulation. But appellant claims that AFDC recipients may obtain the same emergency benefits through special grants under other provisions of the state welfare law. Both lower courts rejected this claim, concluding that the special grant provisions are more limited than EA provisions. 648 F. 2d, at 807–808; 493 F. Supp., at 872–873. In particular, the Court of Appeals, after reviewing relevant state cases, determined that the state EA program would provide grants in cases of loss caused by burglary or public auction following eviction, and would provide food and other immediate living expenses, while special grants would not cover these items. 648 F. 2d, at 808. We have no reason to question the conclusion of the lower courts, given their familiarity with state law. See *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976).

Of course, we do not suggest that a State may not choose to provide AFDC special grants for emergencies as an alternative to including AFDC recipients within the EA program, if the special grants are provided as promptly and for the same emergencies as the EA grants. Cf. *Quern*, 436 U. S., at 734–739.

flict with a valid federal regulation, they are invalid under the Supremacy Clause. See *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 295–296 (1979). In light of our disposition of this Supremacy Clause claim, we do not address appellees' equal protection argument.[16]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

[16] We do not reach the question whether the loss-or-theft provision in N. Y. Soc. Serv. Law § 350–j (McKinney Supp. 1981) is invalid as applied to public assistance recipients *other* than those receiving AFDC. The question presented in appellant's jurisdictional statement refers only to the discrimination against AFDC recipients; thus, appellant challenges the judgment below only insofar as it requires the granting of EA to AFDC recipients.

Syllabus

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST *v.* FALCON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81–574. Argued April 26, 1982—Decided June 14, 1982

After being denied a promotion by petitioner employer, respondent Mexican-American filed a charge with the Equal Employment Opportunity Commission, alleging that he had been passed over for promotion because of his national origin and that petitioner's promotion policy operated against Mexican-Americans as a class. Subsequently, respondent received a right-to-sue letter from the Commission, and he then brought a class action in Federal District Court under Title VII of the Civil Rights Act of 1964. Without conducting an evidentiary hearing, the District Court certified a class consisting of Mexican-American employees of petitioner and Mexican-American applicants who had not been hired. As to liability, the court held that petitioner had discriminated against respondent in its promotion practices but not in its hiring practices, and with respect to the class found that petitioner had discriminated against Mexican-Americans in its hiring practices but not in its promotion practices. Both parties appealed, and the Court of Appeals, rejecting petitioner's argument that the class had been defined too broadly, held that the District Court's class certification was proper under the Fifth Circuit's rule permitting any victim of racial discrimination in employment to maintain an "across-the-board" attack on all unequal employment practices allegedly followed by the employer pursuant to a policy of racial discrimination. On the merits, the Court of Appeals upheld respondent's promotion claim, but held that the District Court's findings were insufficient to support recovery on behalf of the class. Subsequently, this Court vacated the Court of Appeals' judgment and remanded the case for further consideration in light of *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248. The Court of Appeals then vacated its judgment as to respondent's promotion claim but reinstated its approval of the District Court's class certification.

Held: The District Court erred in permitting respondent to maintain a class action on behalf of both employees who were denied promotion and applicants who were denied employment. Pp. 155–161.

(a) An individual litigant seeking to maintain a class action under Title VII must meet Federal Rule of Civil Procedure 23(a)'s specified "prerequisites of numerosity, commonality, typicality, and adequacy of representation." *General Telephone Co.* v. *EEOC*, 446 U. S. 318, 330.

These requirements effectively "limit the class claims to those fairly encompassed by the named plaintiff's claim." *Ibid.* Pp. 155–157.

(b) There can be no disagreement with the proposition underlying the Fifth Circuit's "across-the-board" rule—that racial discrimination is by definition class discrimination. But the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor determines the class that may be certified. Here, to bridge the gap between respondent's promotion claim and the existence of a class of persons who have suffered the same injury as respondent—so that respondent's claim and the class claims share common questions of law or fact and respondent's claim is typical of the class claims—respondent must prove much more than the validity of his own claim. Respondent's complaint provided an insufficient basis for concluding that the adjudication of his claim would require the decision of any common question concerning petitioner's failure to hire more Mexican-Americans. Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the class members he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants. Pp. 157–159.

(c) As the District Court's bifurcated findings on liability demonstrate, the individual and class claims might as well have been tried separately. Thus, it is clear that the maintenance of the action as a class action did not advance "the efficiency and economy of litigation which is a principal purpose of the procedure." *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 553. P. 159.

(d) The District Court's error, and the error inherent in the "across-the-board" rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a). P. 160.

647 F. 2d 633, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in part and dissenting in part, *post*, p. 161.

Thompson Powers argued the cause for petitioner. With him on the briefs were *Mark B. Goodwin* and *E. Russell Nunnally*.

Frank P. Hernandez argued the cause for respondent. With him on the brief was *John E. Collins.**

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether respondent Falcon, who complained that petitioner did not promote him because he is a Mexican-American, was properly permitted to maintain a class action on behalf of Mexican-American applicants for employment whom petitioner did not hire.

I

In 1969 petitioner initiated a special recruitment and training program for minorities. Through that program, respondent Falcon was hired in July 1969 as a groundman, and within a year he was twice promoted, first to lineman and then to lineman-in-charge. He subsequently refused a promotion to installer-repairman. In October 1972 he applied for the job of field inspector; his application was denied even though the promotion was granted several white employees with less seniority.

Falcon thereupon filed a charge with the Equal Employment Opportunity Commission stating his belief that he had been passed over for promotion because of his national origin and that petitioner's promotion policy operated against Mexican-Americans as a class. *Falcon* v. *General Telephone Co. of Southwest*, 626 F. 2d 369, 372, n. 2 (CA5 1980). In due

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*Briefs of *amici curiae* urging reversal were filed by *Robert E. Williams*, *Douglas S. McDowell*, and *Daniel R. Levinson* for the Equal Employment Advisory Council; and by *Wayne S. Bishop*, *Richard K. Walker*, and *Donald W. Anderson* for Republicbank Dallas.

Jack Greenberg, *James M. Nabrit III*, *Barry L. Goldstein*, *Vilma S. Martinez*, and *Morris J. Baller* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al., as *amici curiae* urging affirmance.

Solicitor General Lee, *Assistant Attorney General Reynolds*, *Jessica Dunsay Silver*, *Mark L. Gross*, and *Harold Levy* filed a brief for the United States as *amicus curiae*.

course he received a right-to-sue letter from the Commission and, in April 1975, he commenced this action under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), in the United States District Court for the Northern District of Texas. His complaint alleged that petitioner maintained "a policy, practice, custom, or usage of: (a) discriminating against [Mexican-Americans] because of national origin and with respect to compensation, terms, conditions, and privileges of employment, and (b) . . . subjecting [Mexican-Americans] to continuous employment discrimination."[1] Respondent claimed that as a result of this policy whites with less qualification and experience and lower evaluation scores than respondent had been promoted more rapidly. The complaint contained no factual allegations concerning petitioner's hiring practices.

Respondent brought the action "on his own behalf and on behalf of other persons similarly situated, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure."[2] The class

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[1] App. 14. In paragraph VI of the complaint, respondent alleged:

"The Defendant has established an employment, transfer, promotional, and seniority system, the design, intent, and purpose of which is to continue and preserve, and which has the effect of continuing and preserving, the Defendant's policy, practice, custom and usage of limiting the employment, transfer, and promotional opportunities of Mexican-American employees of the company because of national origin." *Id.*, at 15.

[2] *Id.*, at 13. Rule 23 provides, in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . . . .

"(2) the party opposing the class has acted or refused to act on grounds

identified in the complaint was "composed of Mexican-American persons who are employed, or who might be employed, by GENERAL TELEPHONE COMPANY at its place of business located in Irving, Texas, who have been and who continue to be or might be adversely affected by the practices complained of herein."[2]

After responding to petitioner's written interrogatories,[4] respondent filed a memorandum in favor of certification of "the class of all hourly Mexican American employees who have been employed, are employed, or may in the future be employed and all those Mexican Americans who have applied or would have applied for employment had the Defendant not practiced racial discrimination in its employment practices." App. 46–47. His position was supported by the ruling of the

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generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ."

[2] App. 13–14. The paragraph of the complaint in which respondent alleged conformance with the requirements of Rule 23 continued:

"There are common questions of law and fact affecting the rights of the members of this class who are, and who continue to be, limited, classified, and discriminated against in ways which deprive and/or tend to deprive them of equal employment opportunities and which otherwise adversely affect their status as employees because of national origin. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by Plaintiff. Defendant has acted or refused to act on grounds generally applicable to the Plaintiff." *Id.*, at 14.

[4] Petitioner's Interrogatory No. 8 stated:

"Identify the common questions of law and fac[t] which affect the rights of the members of the purported class." *Id.*, at 26.

Respondent answered that interrogatory as follows:

"The facts which affect the rights of the members of the class are the facts of their employment, the ways in which evaluations are made, the subjective rather than objective manner in which recommendations for raises and transfers and promotions are handled, and all of the facts surrounding the employment of Mexican-American persons by General Telephone Company. The questions of law specified in Interrogatory No. 8 call for a conclusion on the part of the Plaintiff." *Id.*, at 34.

United States Court of Appeals for the Fifth Circuit in *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122 (1969), that any victim of racial discrimination in employment may maintain an "across the board" attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination. Without conducting an evidentiary hearing, the District Court certified a class including Mexican-American employees and Mexican-American applicants for employment who had not been hired.[5]

Following trial of the liability issues, the District Court entered separate findings of fact and conclusions of law with respect first to respondent and then to the class. The District Court found that petitioner had not discriminated against respondent in hiring, but that it did discriminate against him in its promotion practices. App. to Pet. for Cert. 35a, 37a. The court reached converse conclusions about the class, finding no discrimination in promotion practices, but concluding that petitioner had discriminated against Mexican-Americans at its Irving facility in its hiring practices. *Id.*, at 39a–40a.[6]

After various post-trial proceedings, the District Court ordered petitioner to furnish respondent with a list of all Mexican-Americans who had applied for employment at the Irving

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[5] The District Court's pretrial order of February 2, 1976, provided, in part:

"The case is to proceed as a class action and the Plaintiff is to represent the class. The class is to be made up of those employees who are employed and employees who have applied for employment in the Irving Division of the Defendant company, and no other division.

. . . . . .

"Plaintiff and Defendant are to hold further negotiations to see if there is a possibility of granting individual relief to the Plaintiff, MARIANO S. FALCON." App. to Pet. for Cert. 48a–49a.

The District Court denied subsequent motions to decertify the class both before and after the trial.

[6] The District Court ordered petitioner to accelerate its affirmative-action plan by taking specified steps to more actively recruit and promote Mexican-Americans at its Irving facility. See *id.*, at 41a–45a.

facility during the period between January 1, 1973, and October 18, 1976. Respondent was then ordered to give notice to those persons advising them that they might be entitled to some form of recovery. Evidence was taken concerning the applicants who responded to the notice, and backpay was ultimately awarded to 13 persons, in addition to respondent Falcon. The total recovery by respondent and the entire class amounted to $67,925.49, plus costs and interest.[7]

Both parties appealed. The Court of Appeals rejected respondent's contention that the class should have encompassed all of petitioner's operations in Texas, New Mexico, Oklahoma, and Arkansas.[8] On the other hand, the court also rejected petitioner's argument that the class had been defined too broadly. For, under the Fifth Circuit's across-the-board rule, it is permissible for "an employee complaining of one employment practice to represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin." 626 F. 2d, at 375.[9] The court relied on *Payne* v.

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[7] Respondent's individual recovery amounted to $1,040.33. A large share of the class award, $28,827.50, represented attorney's fees. Most of the remainder resulted from petitioner's practice of keeping all applications active for only 90 days; the District Court found that most of the applications had been properly rejected at the time they were considered, but that petitioner could not justify the refusal to extend employment to disappointed applicants after an interval of 90 days. See 463 F. Supp. 315 (1978).

[8] The Court of Appeals held that the District Court had not abused its discretion since each of petitioner's divisions conducted its own hiring and since management of the broader class would be much more difficult. *Falcon* v. *General Telephone Co. of Southwest*, 626 F. 2d 369, 376 (CA5 1980).

[9] The court continued:

"While similarities of sex, race or national origin claims are not dispositive in favor of finding that the prerequisites of Rule 23 have been met, they are an extremely important factor in the determination, that can outweigh the fact that the members of the plaintiff class may be complaining about somewhat different specific discriminatory practices. In addition here, the

Travenol Laboratories, Inc., 565 F. 2d 895 (1978), cert. denied, 439 U. S. 835, in which the Fifth Circuit stated:

> "Plaintiffs' action is an 'across the board' attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of those discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies." 565 F. 2d, at 900, quoted in 626 F. 2d, at 375.

On the merits, the Court of Appeals upheld respondent's claim of disparate treatment in promotion,[10] but held that the District Court's findings relating to disparate impact in hiring were insufficient to support recovery on behalf of the class.[11]

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plaintiff showed more than an alliance based simply on the same type of discriminatory claim. He also showed a similarity of interests based on job location, job function and other considerations." *Id.*, at 375–376 (citations omitted).

The court did not explain how job location, job function, and the unidentified other considerations were relevant to the Rule 23(a) determination.

[10] The District Court found that petitioner's proffered reasons for promoting the whites, rather than respondent, were insufficient and subjective. The Court of Appeals held that respondent had made out a prima facie case under the test set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802, and that the District Court's conclusion that petitioner had not rebutted that prima facie case was not clearly erroneous. In so holding, the Court of Appeals relied on its earlier opinion in *Burdine* v. *Texas Dept. of Community Affairs*, 608 F. 2d 563 (1979). Our opinion in *Burdine* had not yet been announced.

The Court of Appeals disposed of a number of other contentions raised by both parties, and reserved others pending the further proceedings before the District Court on remand. Among the latter issues was petitioner's objection to the District Court's theory for computing the class backpay awards. See n. 7, *supra*.

[11] The District Court's finding was based on statistical evidence comparing the number of Mexican-Americans in the company's employ, and the number hired in 1972 and 1973, with the percentage of Mexican-Americans

After this Court decided *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, we vacated the judgment of the Court of Appeals and directed further consideration in the light of that opinion. *General Telephone Co. of Southwest* v. *Falcon*, 450 U. S. 1036. The Fifth Circuit thereupon vacated the portion of its opinion addressing respondent's promotion claim but reinstated the portions of its opinion approving the District Court's class certification. 647 F. 2d 633 (1981). With the merits of both respondent's promotion claim and the class hiring claims remaining open for reconsideration in the District Court on remand, we granted certiorari to decide whether the class action was properly maintained on behalf of both employees who were denied promotion and applicants who were denied employment.

II

The class-action device was designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701. Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *Id.*, at 701. For in such cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Ibid.*

Title VII of the Civil Rights Act of 1964, as amended, authorizes the Equal Employment Opportunity Commission to sue in its own name to secure relief for individuals aggrieved

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in the Dallas-Fort Worth labor force. See App. to Pet. for Cert. 39a. Since recovery had been allowed for the years 1973 through 1976 based on statistical evidence pertaining to only a portion of that period, and since petitioner's evidence concerning the entire period suggested that there was no disparate impact, the Court of Appeals ordered further proceedings on the class hiring claims. 626 F. 2d, at 380–382.

by discriminatory practices forbidden by the Act. See 42 U. S. C. §2000e–5(f)(1). In exercising this enforcement power, the Commission may seek relief for groups of employees or applicants for employment without complying with the strictures of Rule 23. *General Telephone Co. of Northwest* v. *EEOC*, 446 U. S. 318. Title VII, however, contains no special authorization for class suits maintained by private parties. An individual litigant seeking to maintain a class action under Title VII must meet "the prerequisites of numerosity, commonality, typicality, and adequacy of representation" specified in Rule 23(a). *Id.*, at 330. These requirements effectively "limit the class claims to those fairly encompassed by the named plaintiff's claims." *Ibid.*

We have repeatedly held that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 403 (quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 216). In *East Texas Motor Freight*, a Title VII action brought by three Mexican-American city drivers, the Fifth Circuit certified a class consisting of the trucking company's black and Mexican-American city drivers allegedly denied on racial or ethnic grounds transfers to more desirable line-driver jobs. We held that the Court of Appeals had "plainly erred in declaring a class action." 431 U. S., at 403. Because at the time the class was certified it was clear that the named plaintiffs were not qualified for line-driver positions, "they could have suffered no injury as a result of the allegedly discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury." *Id.*, at 403–404.

Our holding in *East Texas Motor Freight* was limited; we noted that "a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives." *Id.*, at 406, n. 12.

We also recognized the theory behind the Fifth Circuit's across-the-board rule, noting our awareness "that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs," and that "[c]ommon questions of law or fact are typically present." *Id.*, at 405. In the same breath, however, we reiterated that "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable" and that the "mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." *Id.*, at 405–406.

We cannot disagree with the proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination.[12] But the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified. Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.[13] For respondent to

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[12] See *Hall* v. *Werthan Bag Corp.*, 251 F. Supp. 184, 186 (MD Tenn. 1966).

[13] The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and

bridge that gap, he must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination that pervades petitioner's Irving division, or (3) that this policy of ethnic discrimination is reflected in petitioner's other employment practices, such as hiring, in the same way it is manifested in the promotion practices. These additional inferences demonstrate the tenuous character of any presumption that the class claims are "fairly encompassed" within respondent's claim.

Respondent's complaint provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans. Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent,[14] it was error for the District Court to presume that respondent's claim was typical of other claims

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conflicts of interest. In this case, we need not address petitioner's argument that there is a conflict of interest between respondent and the class of rejected applicants because an enlargement of the pool of Mexican-American employees will decrease respondent's chances for promotion. See *General Telephone Co. of Northwest* v. *EEOC*, 446 U. S. 318, 331 ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes"); see also *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 404–405.

[14] See n. 4, *supra*.

against petitioner by Mexican-American employees and applicants. If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation.[15]

The trial of this class action followed a predictable course. Instead of raising common questions of law or fact, respondent's evidentiary approaches to the individual and class claims were entirely different. He attempted to sustain his individual claim by proving intentional discrimination. He tried to prove the class claims through statistical evidence of disparate impact. Ironically, the District Court rejected the class claim of promotion discrimination, which conceptually might have borne a closer typicality and commonality relationship with respondent's individual claim, but sustained the class claim of hiring discrimination. As the District Court's bifurcated findings on liability demonstrate, the individual and class claims might as well have been tried separately. It is clear that the maintenance of respondent's action as a class action did not advance "the efficiency and economy of litigation which is a principal purpose of the procedure." *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 553.

[15] If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.

We do not, of course, judge the propriety of a class certification by hindsight. The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a). As we noted in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.*, at 469 (quoting *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 558). Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.[16] For such an order, particularly during the period before any notice is sent to members of the class, "is inherently tentative." 437 U. S., at 469, n. 11. This flexibility enhances the usefulness of the class-action device; actual, not presumed, conformance with Rule 23(a) remains, however, indispensable.

III

The need to carefully apply the requirements of Rule 23(a) to Title VII class actions was noticed by a member of the Fifth Circuit panel that announced the across-the-board rule. In a specially concurring opinion in *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d, at 1125–1127, Judge Godbold emphasized the need for "more precise pleadings," *id.*, at

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[16] "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Fed. Rule Civ. Proc. 23(c)(1).

1125, for "without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend," *id.*, at 1126. He termed as "most significant" the potential unfairness to the class members bound by the judgment if the framing of the class is overbroad. *Ibid.* And he pointed out the error of the "tacit assumption" underlying the across-the-board rule that "all will be well for surely the plaintiff will win and manna will fall on all members of the class." *Id.*, at 1127. With the same concerns in mind, we reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.

The judgment of the Court of Appeals affirming the certification order is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I agree with the Court's decision insofar as it states the general principles which apply in determining whether a class should be certified in this case under Rule 23. However, in my view it is not necessary to remand for further proceedings since it is entirely clear on this record that no class should have been certified in this case. I would simply reverse the Court of Appeals and remand with instructions to dismiss the class claim.

As the Court notes, the purpose of Rule 23 is to promote judicial economy by allowing for litigation of common questions of law and fact at one time. *Califano* v. *Yamasaki*, 442 U. S. 682, 701 (1979). We have stressed that strict attention to the requirements of Rule 23 is indispensable in employment discrimination cases. *East Texas Motor Freight Sys-*

tem, Inc. v. *Rodriguez*, 431 U. S. 395, 405–406 (1977). This means that class claims are limited to those "'fairly encompassed by the named plaintiff's claims.'" *Ante*, at 156, quoting *General Telephone Co. of Northwest* v. *EEOC*, 446 U. S. 318, 330 (1980).

Respondent claims that he was not promoted to a job as field inspector because he is a Mexican-American. To be successful in his claim, which he advances under the "disparate treatment" theory, he must convince a court that those who were promoted were promoted not because they were better qualified than he was, but, instead, that he was not promoted for discriminatory reasons. The success of this claim depends on evaluation of the comparative qualifications of the applicants for promotion to field inspector and on analysis of the credibility of the reasons for the promotion decisions provided by those who made the decisions. Respondent's class claim on behalf of unsuccessful applicants for jobs with petitioner, in contrast, is advanced under the "adverse impact" theory. Its success depends on an analysis of statistics concerning petitioner's hiring patterns.*

The record in this case clearly shows that there are no common questions of law or fact between respondent's claim and the class claim; the only commonality is that respondent is a Mexican-American and he seeks to represent a class of Mexican-Americans. See *ante*, at 153, and n. 9. We have repeatedly held that the bare fact that a plaintiff alleges racial or ethnic discrimination is not enough to justify class certification. *Ante*, at 157; *East Texas Motor Freight*, *supra*, at 405–406. Accordingly, the class should not have been certified.

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*There is no allegation that those who made the hiring decisions are the same persons who determined who was promoted to field inspector. Thus there is no claim that the same person or persons who made the challenged decisions were motivated by prejudice against Mexican-Americans, and that this prejudice manifested itself in both the hiring decisions and the decisions not to promote respondent.

Moreover, while a judge's decision to certify a class is not normally to be evaluated by hindsight, *ante*, at 160, since the judge cannot know what the evidence will show, there is no reason for us at this stage of these lengthy judicial proceedings not to proceed in light of the evidence actually presented. The Court properly concludes that the Court of Appeals and the District Court failed to consider the requirements of Rule 23. In determining whether to reverse and remand or to simply reverse, we can and should look at the evidence. The record shows that there is no support for the class claim. Respondent's own statistics show that 7.7% of those hired by petitioner between 1972 and 1976 were Mexican-American while the relevant labor force was 5.2% Mexican-American. *Falcon* v. *General Telephone Company of Southwest*, 626 F. 2d 369, 372, 381, n. 16 (1980). Petitioner's unchallenged evidence shows that it hired Mexican-Americans in numbers greater than their percentage of the labor force even though Mexican-Americans applied for jobs with petitioner in numbers smaller than their percentage of the labor force. *Id.*, at 373, n. 4. This negates any claim of Falcon as a class representative.

Like so many Title VII cases, this case has already gone on for years, draining judicial resources as well as resources of the litigants. Rather than promoting judicial economy, the "across-the-board" class action has promoted multiplication of claims and endless litigation. Since it is clear that the class claim brought on behalf of unsuccessful applicants for jobs with petitioner cannot succeed, I would simply reverse and remand with instructions to dismiss the class claim.

CALIFORNIA *v.* TEXAS ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 88, Orig. Decided June 14, 1982

Held: California's motion for leave to file a bill of complaint seeking determination of whether Howard Hughes was domiciled in California or Texas at the time of his death is granted.

(a) The bill of complaint states a "controversy" between two States within this Court's exclusive jurisdiction under 28 U. S. C. § 1251(a). California and Texas are undeniably adversaries in this action since each State's authority to impose a death tax on the intangibles owned by a decedent depends on the decedent's having been a domiciliary of that State and it is the law of each State that an individual has but one domicile. Thus, the outcome of this action will determine which State is entitled to levy death taxes on the Hughes estate. Moreover, California's allegations, although not yet proved, indicating that the estate was insufficient to satisfy the total amount of potential death tax claims by both States, are sufficient under *Texas* v. *Florida*, 306 U. S. 398, to characterize this case as a "controversy" between two States for purposes of § 1251(a).

(b) It is appropriate that this Court exercise its jurisdiction in this case. When California's previous motion for leave to file its complaint was denied, 437 U. S. 601, several Members of the Court suggested that the need to exercise original jurisdiction might be obviated by an action in a federal district court, under the Federal Interpleader Act, to determine Hughes' domicile. However, this Court's decision in *Cory* v. *White*, *ante*, p. 85, holds that such a statutory interpleader action cannot be brought. Thus, the precondition of nonavailability of another forum, necessary for this Court's exercise of original jurisdiction, is met.

PER CURIAM.

In this motion, California seeks leave to file a complaint against Texas under this Court's original jurisdiction. The proposed complaint asks us to decide whether Howard Hughes was domiciled in California or Texas at the time of his death. The decision about domicile could determine which State is entitled to levy death taxes on the estate.

This motion renews the one which California made in November 1977. At that time, we denied leave to file. *Cali-*

fornia v. *Texas*, 437 U. S. 601 (1978). Following the suggestion of four Justices who concurred in *California* v. *Texas*, the estate then sought a determination of Hughes' domicile by filing an interpleader action under 28 U. S. C. § 1335 in Federal District Court. This motion for leave to file a complaint accompanied the petition for certiorari in *Cory* v. *White*, *ante*, p. 85, in which California taxing officials requested review of the decision of the Fifth Circuit holding that the Federal Interpleader Act provided a jurisdictional basis for resolving the dispute.

We granted certiorari in *Cory* v. *White*, 452 U. S. 904 (1981), and today have held that the Federal Interpleader Act, 28 U. S. C. § 1335, does not give a federal district court jurisdiction to resolve inconsistent death tax claims by the officials of two States. See *ante*, at 91. We reached that decision because the suit is barred by the Eleventh Amendment under *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937). We now also conclude that California's motion for leave to file should be granted.

First, California's bill of complaint states a "controversy" between California and Texas within the exclusive jurisdiction of this Court under 28 U. S. C. § 1251(a). It is undisputed that each State's authority to impose a death tax on the intangibles owned by a decedent depends on the decedent's having been a domiciliary of that State. Also, it is the law of each State that an individual has but one domicile. Thus only one State is entitled to impose death taxes; the outcome of this action would determine which State is privileged to tax. The other would be barred from doing so. It is apparent, therefore, that California and Texas are asserting inconsistent claims and are undeniably adversaries in this action.

Moreover, in its Memorandum in Support of Motion to File Bill of Complaint 6, California asserts:

> "The effective rate of tax in California on all amounts in excess of $400,000 is 24% (*see* CAL. REV. & TAX CODE § 13406(g)); the effective rate of tax in Texas (includ-

> ing the so-called 'pick-up tax') on amounts exceeding $1,000,000 is approximately 16% (*see* TEX. TAX CODE ANN. ARTS. 14.05, 14.12); and the federal estate tax on amounts in excess of $10,000,000 is 77%, less a credit of 16% for state death taxes (*see* 26 U. S. C. §§ 2001, 2011). The combined marginal rate of tax is therefore 101%." (Footnote omitted.)

California adds that interest on the unpaid taxes will further deplete the estate. Although these allegations have not been proved, they are sufficient under *Texas* v. *Florida*, 306 U. S. 398 (1939), to characterize this case as a "controversy" between two States within the meaning of 28 U. S. C. § 1251(a).[1]

In *Texas* v. *Florida*, *supra*, this Court, raising the issue *sua sponte*, held that it had original jurisdiction over a suit "brought to determine the true domicile of decedent as the basis of rival claims of four states for death taxes upon his estate." 306 U. S., at 401. None of the States had reduced its claims to judgments, but all conceded that the estate was

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[1] Texas asserts that California has not demonstrated the jurisdictional prerequisite of showing a "threatened injury" of "serious magnitude and imminent." Brief in Opposition to Motion for Leave to File 6, quoting *Alabama* v. *Arizona*, 291 U. S. 286, 292 (1934). Texas explains that the true value of the estate is subject to dispute and litigation and that the estate can fully satisfy all potential death tax claims against it even under California's own valuation.

The Court in *Texas* v. *Florida*, however, required only that "[t]he risk that decedent's estate might constitutionally be subjected to conflicting tax assessments in excess of its total value and that the right of complainant or some other state to collect the tax might thus be defeated was a real one." 306 U. S., at 410. The claims before us here are no more speculative than the ones there. As that case recognized, to bring an interpleader suit, "[a] plaintiff need not await actual institution of independent suits; it is enough if he shows that conflicting claims are asserted and that the consequent risk of loss is substantial." *Id.*, at 406. Thus, California's allegations are sufficient to present a controversy within the meaning of 28 U. S. C. § 1251(a). Despite the suggestion that we do so, we decline to overrule *Texas* v. *Florida*.

insufficient to satisfy the total amount of taxes claimed. The Court compared the suit to a bill in the nature of interpleader, which permits a plaintiff threatened with rival claimants to the same debt or legal duty to bring an interpleader action before the institution of the independent suits. On the basis of this analogy, the Court concluded:

> "When, by appropriate procedure, a court possessing equity powers is . . . asked to prevent the loss which might otherwise result from the independent prosecution of rival but mutually exclusive claims, a justiciable issue is presented for adjudication which because it is a recognized subject of the equity procedure which we have inherited from England, is a 'case' or 'controversy,' within the meaning of the Constitutional provision; and when the case is one prosecuted between states, which are the rival claimants, and the risk of loss is shown to be real and substantial, the case is within the original jurisdiction of this Court conferred by the Judiciary Article." *Id.*, at 407–408.

As Justice Stewart wrote when California first petitioned this Court to resolve its dispute with Texas over Hughes' estate: "The facts alleged in the complaint now before us are indistinguishable in all material respects from those on which jurisdiction was based in *Texas* v. *Florida*." *California* v. *Texas*, 437 U. S., at 606 (concurring opinion). We agree.[2]

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[2] As in *Texas* v. *Florida*, the idiosyncratic pattern of the decedent's life provides a basis for more than one State's claims. Hughes spent much of his time in California and many of his business activities were based there. He was, however, born in Texas and long continued to use Texas as his mailing address and sometimes stated that Texas was his domicile. Indeed, a jury in Texas probate proceedings has already found Hughes to have been a domiciliary of Texas at the time of his death.

The administrator of Hughes' estate timely perfected an appeal of that judgment. Brief for Respondent Lummis in *Cory* v. *White*, O. T. 1981, No. 80–1556, p. 5. The Texas Court of Civil Appeals stayed the appeal of the Texas domicile judgment pending the outcome of the federal interpleader action. *Id.*, at 7.

Thus, this dispute is a controversy between two States within our original jurisdiction under 28 U. S. C. § 1251(a).

Second, it is appropriate to exercise our jurisdiction in this case. A determination that this Court has original jurisdiction over a case, of course, does not require us to exercise that jurisdiction. We have imposed prudential and equitable limitations upon the exercise of our original jurisdiction. As we explained in *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 93–94 (1972):

> "We construe 28 U. S. C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

At the time we decided *California* v. *Texas*, it seemed to several Members of the Court that statutory interpleader might obviate the need to exercise original jurisdiction. JUSTICE BRENNAN, for example, explained:

> "If we have jurisdiction at all, that jurisdiction does not attach until it can be shown that the two States may possibly be able to obtain conflicting adjudications of domicile. That showing has not been made at this time in this case, since it may well be possible for the Hughes estate to obtain a judgment under the Federal Interpleader Statute, 28 U. S. C. § 1335, from a United States district court, which would be binding on both California and Texas. In this event, the precondition for our original jurisdiction would be lacking. Accord-

> ingly, I would deny California's motion, at least until such time as it is shown that such a statutory interpleader action cannot or will not be brought." 437 U. S., at 601–602.

Our decision in *Cory* v. *White* has now shown that such a statutory interpleader action cannot be brought. Thus, the precondition for the exercise of original jurisdiction has been met.

There were several other uncertainties that affected the case when we denied California's earlier motion. At that time, Texas urged that the controversy was not ripe because of the pending claim of the Howard Hughes Medical Institute that a "lost will" left the entire estate to it and the contention that the so-called "Mormon Will" was valid. A jury has since rejected the "Mormon Will," the Nevada Supreme Court and the Texas Probate Court the "lost will." Another changed circumstance is the expiration of a conditional settlement agreement between California and the estate. Texas had argued because of this allegedly collusive agreement, the case was not a justiciable case or controversy.

We conclude that our original jurisdiction is properly invoked under *Texas* v. *Florida*, and we grant California leave to file its bill of complaint. The defendants shall have 60 days to answer.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE MARSHALL, JUSTICE REHNQUIST, and JUSTICE STEVENS join, dissenting.

In *Cory* v. *White*, *ante*, at 89, the Court today reaffirms the holding of *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937), that "inconsistent determinations by the courts of two States as to the domicile of a taxpayer [do] not raise a substantial federal constitutional question." Under *Worcester County* there is no constitutional bar to both Texas

and California taxing the Hughes estate on the ground that he was a domiciliary.

Having reaffirmed the authority of *Worcester County*, the Court concludes that "California and Texas are asserting inconsistent claims and are undeniably adversaries in [the interpleader action]." *Ante*, at 165. But its own premises will not support this conclusion. If both States legally can tax the Hughes estate, a controversy between them would arise only if both were to obtain money judgments against the estate and, further, if the estate then were to prove insufficient to satisfy both claims. Yet it is no more clear today than it was in 1978, when we unanimously decided *California* v. *Texas*, 437 U. S. 601 (1978), that this situation ever will occur. Thus, under the Court's own assumptions, there is no ripe controversy between the States, and no basis for our consideration of the original complaint in No. 88, Original.

As if discomfited by the logic of its position, the Court argues that the jurisdictional allegations here at least are "no more speculative," *ante*, at 166, n. 1, than those in *Texas* v. *Florida*, 306 U. S. 398 (1939). Yet as Justice Stewart argued persuasively in our 1978 decision in *California* v. *Texas*, *supra*, it is inescapable that *Texas* v. *Florida* was wrongly decided. See 437 U. S., at 606, 611–612 (Stewart, J., concurring). The mere possibility of inconsistent state determinations of domicile, resulting in a still more remote possibility of the estate's being insufficient to satisfy the competing claims, simply does not give rise to a case or controversy in the constitutional sense. "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 39 (1976). See *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U. S. 464, 472 (1982); *Warth* v. *Seldin*, 422 U. S. 490, 508 (1975).

Nor is the Court entitled to base its finding of original jurisdiction on an "analogy" between the original action and "a bill in the nature of interpleader." *Ante*, at 167. Under the Interpleader Act, the stakeholder is the "plaintiff." 28 U. S. C. § 1335. Having been notified of claims by two or more "claimants," the stakeholder normally would have standing to litigate the validity of each of the individual claims. The presence of these justiciable controversies between stakeholder and claimants satisfies the "case or controversy" requirement of Art. III. Interpleader jurisdiction merely provides for convenient resolution in a single forum. Interpleader jurisdiction thus is irrelevant to the question whether there is an independently justiciable controversy "between" States.

TEXAS *v.* OKLAHOMA

ON BILL OF COMPLAINT

No. 85, Orig. Decided June 14, 1982

Decree entered.

DECREE

The motion for entry of judgment by consent of plaintiff and defendant, with the deletion of paragraph 10 thereof, and as amended with respect to paragraph 7, is granted.

IT IS ORDERED, ADJUDGED, AND DECREED:

1. This judgment determines the boundary line between Texas and Oklahoma along the South bank of the Red River in Grayson County, Texas, from a point on said River as it existed prior to the construction of the Texoma Reservoir Dam (Denison Dam) approximately 1973 feet West of the center line of said Dam, with its meanders, to a point on said River approximately 6103 feet East of the center line of said Dam, upon the Complaint, Answer and agreement of Counsel for Texas and Oklahoma.

2. The source of the boundary line between Texas and Oklahoma from the 100th meridian of longitude to the eastern border of Oklahoma (which encompasses the boundary determined by this judgment) lies in the Treaty of 1819, 8 Stat. 252 (1821), which was construed by the Court in *United States* v. *Texas*, 162 U. S. 1 (1895), to be the south bank of the Red River. The Court later confirmed this definition of the boundary in *Oklahoma* v. *Texas*, 256 U. S. 70 (1921), and in a later partial decree therein, 261 U. S. 340, 341–342 (1923), defined the South bank as:

> ". . . the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river, which separates its bed from the adjacent upland, whether valley or hill, and usually

serves to confine the waters within the bed, and to preserve the course of the river.

". . . The boundary between the two states is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

". . . At exceptional places where there is no well-defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline, conforming to the mean level of the waters, when at other places in that vicinity they reach and wash the cut bank without overflowing it."

3. As a result of the partial decree in 1923 and other partial decrees arising from the same controversy, a boundary commission was established to take evidence, find facts and report to the Court. Said Commission filed a documentary report, 269 U. S. 536 (1925), styled as the Third Report of the Boundary Commissioners. At page 41 of said Report appears the following entry:

VII.

"IN
GRAYSON COUNTY, TEXAS
OPPOSIVE
MARSHALL AND BRYAN COUNTIES,
OKLAHOMA.

"Public Hearing:
Sherman, Texas, May 7, 1925

"We found no avulsive changes in
the position of the Red River in
this County and make no surveys."

4. In 1939 the United States Army Corps of Engineers made surveys of certain tracts of land in Grayson County, Texas, known as Tract T–2–1, Tract T–2–2 and Tract T–2–4,

whose northern boundaries coincide with the South bank of the Red River and the boundary determined by this judgment. Said surveys were made in anticipation of the condemnation of said Tracts for purposes of the construction of the Texoma Dam Facility and Reservoir pursuant to an Act of Congress, 52 Stat. 1215 (1938).

5. On September 7, 1940, a judgment was entered in the United States District Court for the Eastern District of Texas making final the award of special commissioners as to Tract T–2–1. On November 23, 1940, judgment was entered in the United States District Court for the Eastern District of Texas making final the acquisition by the United States of Tract T–2–4. On December 28, 1939, a warranty deed was executed by P. O. Brack to the United States as to Tract T–2–2.

6. On June 23, 1980, the Plaintiff and Defendant together retained a Registered Public Surveyor of the State of Texas to make a reenactment survey of Tract T–2–1, Tract T–2–2 and Tract T–2–4. On the basis of such survey it has been determined that, when tying back to the original South bank of the Red River, the northern boundaries of Tracts T–2–1, T–2–2 and T–2–4 (coinciding with the South bank of the Red River), as established by the U. S. Army Corps of Engineers in its survey of 1939 were correct at the time that survey was made, which was prior to the construction of the Texoma Reservoir Dam Facility. A certified copy of the plat of the survey commissioned by the States with the surveyor's certified explanation thereof is filed with the Clerk of this Court.

7. The boundary between Texas and Oklahoma determined by this judgment coincides with the boundaries of Tracts T–2–1, T–2–2 and T–2–4 and is described as follows, with all bearings from the above referenced judgment and deed descriptions, and all distances in feet:

BEGINNING at a point, same being the centerline of Shawnee Creek and the Northeast corner of Tract T–2–4 as

acquired by the United States in a Judgment as recorded in Volume 420 Page 556 of the Deed Records of Grayson County, Texas.

THENCE up the south bank of the Red River as it existed prior to the construction of the Texoma Reservoir and Denison Dam, with its meanders: South 78°08′ West a distance of 528.9 feet; South 86°10′ West a distance of 1370.50 feet; South 89°06′ West a distance of 484.0 feet; North 88°22′ West a distance of 447.2 feet; North 85°37′ West passing the Northeast corner of Tract T–2–2 as recorded in Volume 417 Page 23 of the Deed Records of Grayson County, Texas and the total distance of 1675.30 feet; North 76°21′ West a distance of 413.7 feet; North 86°01′ West a distance of 170.10 feet to the Northwest corner of Tract T–2–2;

THENCE North 76°01′ West a distance of 394.50 feet; North 87°34′ West a distance of 1198.90 feet; North 68°27′ West a distance of 362.20 feet; North 55°54′ West a distance of 1030.80 feet to a point, same being the Northwest corner of Tract T–2–1 as acquired by the United States in a Judgment as recorded in Volume 417 Page 123 of the Deed Records of Grayson County, Texas.

8. The boundary line delineated hereinabove is depicted by a line marked "STATE LINE" on the plat of the survey commissioned by the States and filed with the Clerk of this Court.

9. The construction of the Texoma Reservoir and Denison Dam did not alter the boundary between Texas and Oklahoma as the South bank of the Red River as it existed prior to such construction in any manner whatsoever.

11. The cost of this action shall be equally divided between the two States.

SUMITOMO SHOJI AMERICA, INC. *v.* AVAGLIANO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80–2070. Argued April 26, 1982—Decided June 15, 1982*

Petitioner Sumitomo Shoji America, Inc., is a New York corporation and a wholly owned subsidiary of a Japanese general trading company. Past and present female secretarial employees of Sumitomo, who, with one exception, are United States citizens, brought a class action in Federal District Court against Sumitomo, claiming that its alleged practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions violated Title VII of the Civil Rights Act of 1964. Sumitomo moved to dismiss the complaint on the ground that its practices were protected under Art. VIII(1) of the Friendship, Commerce and Navigation Treaty between the United States and Japan. Article VIII(1) provides that the "companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." Article XXII(3) of the Treaty defines "companies" as "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party." The District Court refused to dismiss, holding that because Sumitomo was incorporated in the United States, it was not covered by Art. VIII(1), but the court then certified for interlocutory appeal to the Court of Appeals the question whether the terms of the Treaty exempted Sumitomo from Title VII's provisions. The Court of Appeals reversed in part, holding that Art. VIII(1) was intended to cover locally incorporated subsidiaries of foreign companies but that the Treaty language did not insulate Sumitomo's employment practices from Title VII scrutiny.

Held: Sumitomo is not a company of Japan and thus is not covered by Art. VIII(1) of the Treaty. Pp. 180–189.

(a) Under Art. XXII(3)'s literal language, Sumitomo is a company of the United States, since it was "constituted under the applicable laws and regulations" of New York. As a company of the United States, it cannot invoke the rights provided in Art. VIII(1), which are available only to companies of Japan operating in the United States and to compa-

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*Together with No. 81–24, *Avagliano et al.* v. *Sumitomo Shoji America, Inc.*, also on certiorari to the same court.

nies of the United States operating in Japan. Where both parties to the Treaty agree with this meaning and such interpretation follows from the clear Treaty language, deference will be given to it, absent extraordinarily strong contrary evidence. Pp. 180–185.

(b) Adherence to the Treaty language does not overlook the Treaty's purpose, since the primary purpose of the corporation provisions was to give corporations of each signatory legal status in the territory of the other party and to allow them to conduct business in the other country on a comparable basis with domestic firms. Pp. 185–189.

638 F. 2d 552, vacated and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Abram Chayes argued the cause for petitioner in No. 80–2070 and respondent in No. 81–24. With him on the briefs were *J. Portis Hicks*, *Jiro Murase*, and *Carl J. Green*.

Lewis M. Steel argued the cause and filed a brief for respondents in No. 80–2070 and petitioners in No. 81–24.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Edwin S. Kneedler*, *Brian K. Landsberg*, and *Michael J. Connolly*.†

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether Article VIII(1) of the Friendship, Commerce and Navigation Treaty between

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†*John R. Horan* filed a brief for the Japan External Trade Organization as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Nathan Z. Dershowitz* for the American Jewish Congress et al.; by *Thomas I. Atkins* for the National Association for the Advancement of Colored People; and by *Edward John O'Neill, Jr.*, for Michael E. Spiess et al.

Briefs of *amici curiae* were filed by *Robert Abrams*, Attorney General, *pro se*, *Shirley Adelson Siegel*, Solicitor General, and *Peter G. Crary*, Assistant Attorney General, for the Attorney General of the State of New York; by *Robert D. Owen* for the Ministry of International Trade and Industry of the Government of Japan; by *John K. Weir* for the East Asiatic Co., Ltd., et al.; by *Neil Martin* for C. Itoh & Co. (America), Inc.; and by *John R. Hupper* and *Paul M. Dodyk* for Shell Petroleum N.V.

the United States and Japan provides a defense to a Title VII employment discrimination suit against an American subsidiary of a Japanese company.

I

Petitioner, Sumitomo Shoji America, Inc., is a New York corporation and a wholly owned subsidiary of Sumitomo Shoji Kabushiki Kaisha, a Japanese general trading company or *sogo shosha*.[1] Respondents are past and present female secretarial employees of Sumitomo.[2] All but one of the respondents are United States citizens; that one exception is a Japanese citizen living in the United States. Respondents brought this suit as a class action claiming that Sumitomo's alleged practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions violated both 42 U. S. C. § 1981 and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV).[3] Respondents sought both injunctive relief and damages.

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[1] General trading companies have been a unique fixture of the Japanese economy since the Meiji era. These companies each market large numbers of Japanese products, typically those of smaller concerns, and also have a large role in the importation of raw materials and manufactured products to Japan. In addition, the trading companies play a large part in financing Japan's international trade. The largest trading companies—including Sumitomo's parent company—in a typical year account for over 50% of Japanese exports and over 60% of imports to Japan. See Krause & Sekiguchi, Japan and the World Economy, in Asia's New Giant: How the Japanese Economy Works 383, 389–397 (H. Patrick & H. Rosovsky eds. 1976).

[2] Respondents have also filed a cross-petition in this case. Thus, the past and present secretaries, generally referred to as respondents, are the respondents in No. 80–2070 and the cross-petitioners in No. 81–24. Sumitomo is the petitioner in No. 80–2070 and the cross-respondent in No. 81–24.

[3] Prior to bringing this suit, respondents each filed timely complaints with the Equal Employment Opportunity Commission. The EEOC issued

Without admitting the alleged discriminatory practice, Sumitomo moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint. Sumitomo's motion was based on two grounds: (1) discrimination on the basis of Japanese citizenship does not violate Title VII or § 1981; and (2) Sumitomo's practices are protected under Article VIII(1) of the Friendship, Commerce and Navigation Treaty between the United States and Japan, Apr. 2, 1953, [1953] 4 U. S. T. 2063, T. I. A. S. No. 2863. The District Court dismissed the § 1981 claim, holding that neither sex discrimination nor national origin discrimination are cognizable under that section. 473 F. Supp 506 (SDNY 1979). The court refused to dismiss the Title VII claims, however; it held that because Sumitomo is incorporated in the United States it is not covered by Article VIII(1) of the Treaty. The District Court then certified for interlocutory appeal to the Court of Appeals under 28 U. S. C. § 1292(b) the question of whether the terms of the Treaty exempted Sumitomo from the provisions of Title VII.

The Court of Appeals reversed in part. 638 F. 2d 552 (CA2 1981). The court first examined the Treaty's language and its history and concluded that the Treaty parties intended Article VIII(1) to cover locally incorporated subsidiaries of foreign companies such as Sumitomo. The court then held that the Treaty language does not insulate Sumitomo's executive employment practices from Title VII scrutiny. The court concluded that under certain conditions, Japanese citizenship could be a bona fide occupational qualification for high-level employment with a Japanese-owned domestic corporation and that Sumitomo's practices might

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"right to sue" letters to the respondents on October 27, 1977. This suit was filed on November 21, 1977, well within the statutory 90-day period allowed for filing suits after receipt of an EEOC notice of right to sue. 42 U. S. C. § 2000e–5(f)(1).

thus fit within a statutory exception to Title VII.[4] The court remanded for further proceedings.[5]

We granted certiorari, 454 U. S. 962 (1981), and we vacate and remand.

II

Interpretation of the Friendship, Commerce and Navigation Treaty between Japan and the United States must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Maximov* v. *United States*, 373 U. S. 49, 54 (1963). See also *The Amiable Isabella*, 6 Wheat. 1, 72 (1821).

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[4] Sumitomo argued in the District Court that discrimination on the basis of national citizenship, as opposed to national origin, was not prohibited by Title VII. The District Court disagreed, however. It relied on *Espinoza* v. *Farah Manufacturing Co.*, 414 U. S. 86, 92 (1973), in which we noted that "Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." Although discussed at length in the briefs, this issue is not properly before the Court and we do not reach it. It was not included in the question certified for interlocutory review by the Court of Appeals under 28 U. S. C. § 1292(b), was not decided by the Court of Appeals, and was not set forth or fairly included in the questions presented for review by this Court as required by Rule 21.1(a).

[5] In a nearly identical case, a divided panel of the Court of Appeals for the Fifth Circuit came to somewhat contrary results. *Spiess* v. *C. Itoh & Co.*, 643 F. 2d 353 (1981), cert. pending, No. 81–1496. The Fifth Circuit majority agreed with the Second Circuit decision that a locally incorporated subsidiary of a Japanese corporation is covered by Article VIII(1) of the Treaty, but disagreed with the latter court's decision on the effect of the Treaty on Title VII. The court held that the Treaty provision did protect the subsidiary's practices from Title VII liability.

In dissent, Judge Reavley disagreed with the majority's initial conclusion. He would have held that under the plain language of the Treaty, locally incorporated subsidiaries are to be considered domestic corporations and are thus not covered by Article VIII(1).

Article VIII(1) of the Treaty provides in pertinent part:

> "*[C]ompanies of either Party* shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." (Emphasis added.)[6]

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[6] Similar provisions are contained in the Friendship, Commerce and Navigation Treaties between the United States and other countries. See, *e. g.*, Article XII(4) of the Treaty with Greece, [1954] 5 U. S. T. 1829, 1857, T. I. A. S. No. 3057 (1951); Article VIII(1) of the Treaty with Israel, [1954] 5 U. S. T. 550, 557, T. I. A. S. No. 551 (1951); Article VIII(1) of the Treaty with the Federal Republic of Germany, [1956] 7 U. S. T. 1839, 1848, T. I. A. S. No. 3593 (1954).

These provisions were apparently included at the insistence of the United States; in fact, other countries, including Japan, unsuccessfully fought for their deletion. See, *e. g.*, State Department Airgram No. A–453, dated Jan. 7, 1952, pp. 1, 3, reprinted in App. 130a, 131a, 133a (discussing Japanese objections to Article VIII(1)); Foreign Service Despatch No. 2529, dated Mar. 18, 1954, reprinted in App. 181a, 182a (discussing German objections to Article VIII(1)).

According to Herman Walker, Jr., who at the time of the drafting of the Treaty served as Adviser on Commercial Treaties at the State Department, Article VIII(1) and the comparable provisions of other treaties were intended to avoid the effect of strict percentile limitations on the employment of Americans abroad and "to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel." Walker, Provisions on Companies in United States Commercial Treaties, 50 Am. J. Int'l L. 373, 386 (1956); Walker, Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229, 234 (1956). According to the State Department, Mr. Walker was responsible for formulation of the postwar form of the Friendship, Commerce and Navigation Treaty and negotiated several of the treaties for the United States. Department of State Airgram A–105, dated Jan. 9, 1976, reprinted in App. 157a.

See also Foreign Service Despatch No. 2529, *supra*, App. 182a (Purpose of Article VIII(1) of Treaty with Germany "is to preclude the imposition of 'percentile' legislation. It gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law").

Clearly Article VIII(1) only applies to companies of one of the Treaty countries operating in the other country. Sumitomo contends that it is a company of Japan, and that Article VIII(1) of the Treaty grants it very broad discretion to fill its executive, managerial, and sales positions exclusively with male Japanese citizens.[7]

Article VIII(1) does not define any of its terms; the definitional section of the Treaty is contained in Article XXII. Article XXII(3) provides:

> "As used in the present Treaty, the term 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party." (Emphasis added.)

Sumitomo is "constituted under the applicable laws and regulations" of New York; based on Article XXII(3), it is a company of the United States, not a company of Japan.[8] As

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[7] The issues raised by this contention are clearly of widespread importance. As we noted in n. 6, *supra*, treaty provisions similar to that invoked by Sumitomo are in effect with many other countries. In fact, some treaties contain even more broad language. See, *e. g.*, Article XII(4), Treaty of Friendship, Commerce and Navigation with Greece, [1954] 5 U. S. T., at 1857–1859 ("Nationals and companies of either party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents *and other employees of their choice* . . .") (emphasis added). As of 1979, United States affiliates of foreign corporations employed over 1.6 million workers in this country. Howenstine, Selected Data on the Operations of U. S. Affiliates of Foreign Companies, 1978 and 1979, in Survey of Current Business 35, 36 (U. S. Dept. of Commerce, May 1981).

[8] The clear language of Article VII(1) and Article XXII(3) is consistent with other Treaty provisions. For example, Article XVI(2) accords national treatment to "[a]rticles produced by nationals and companies of ei-

a company of the United States operating in the United States, under the literal language of Article XXII(3) of the Treaty, Sumitomo cannot invoke the rights provided in Article VIII(1), which are available only to companies of Japan operating in the United States and to companies of the United States operating in Japan.

The Governments of Japan and the United States support this interpretation of the Treaty. Both the Ministry of Foreign Affairs of Japan and the United States Department of State agree that a United States corporation, even when wholly owned by a Japanese company, is not a company of Japan under the Treaty and is therefore not covered by Article VIII(1). The Ministry of Foreign Affairs stated its position to the American Embassy in Tokyo with reference to this case:

> "The Ministry of Foreign Affairs, as the Office of [the Government of Japan] responsible for the interpretation of the [Friendship, Commerce and Navigation] Treaty, reiterates its view concerning the application of Article 8, Paragraph 1 of the Treaty: For the purpose of the Treaty, companies constituted under the applicable laws . . . of either Party shall be deemed companies thereof and, therefore, a subsidiary of a Japanese company which is incorporated under the laws of New York is not

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ther Party within the territories of the other Party, *or by companies of the latter Party controlled by such nationals and companies . . . .*" (Emphasis added.) This provision obviously envisions that companies of one party may be controlled by companies of the other party. If the nationality of a company were determined by the nationality of its controlling entity as Sumitomo proposes, rather than by the place of its incorporation, this provision would make no sense.

Several other Treaty provisions would make little sense if American subsidiaries were considered companies of Japan. Articles VII(1), VII(4), and XVI(2) contain clauses dealing with companies or enterprises controlled by companies of either party. If those companies or enterprises were themselves companies of the country of their parents, this separate treatment would be unwarranted.

covered by Article 8 Paragraph 1 when it operates in the United States."[9]

The United States Department of State also maintains that Article VIII(1) rights do not apply to locally incorporated subsidiaries.[10] Although not conclusive, the meaning attributed to treaty provisions by the Government agencies

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[9] State Department Cable, Tokyo 03300, dated Feb. 26, 1982 (cable from the United States Embassy in Tokyo to the Secretary of State relaying the position of the Ministry of Foreign Affairs of Japan). See also Diplomatic Communication from the Embassy of Japan in Washington to the United States Department of State, dated Apr. 21, 1982 ("The Government of Japan reconfirms its view that a subsidiary of a Japanese company which is incorporated under the laws of New York is not itself covered by article 8., paragraph 1 of the Treaty of Friendship, Commerce and Navigation between Japan and the United States (the FCN Treaty) when it operates in the United States").

[10] Brief for United States as *Amicus Curiae* 8–22; Letter of James R. Atwood, Deputy Legal Adviser, U. S. Department of State, to Lutz Alexander Prager, Assistant General Counsel, Equal Employment Opportunity Commission, dated Sept. 11, 1979, reprinted in App. 307a. ("On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U. S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally-incorporated subsidiaries, and that therefore U. S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty").

The Court of Appeals and Sumitomo dismiss the Atwood letter as incorrect, and point to a letter written by a previous State Department Deputy Legal Adviser as taking the contrary view. Letter of Lee R. Marks, Deputy Legal Adviser, U. S. Department of State, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated Oct. 17, 1978, reprinted in App. 94a. However neither of these letters is indicative of the state of mind of the Treaty negotiators; they are merely evidence of the later interpretation of the State Department as the agency of the United States charged with interpreting and enforcing the Treaty. However ambiguous the State Department position may have been previously, it is certainly beyond dispute that the Department now interprets the Treaty in conformity with its plain language, and is of the opinion that Sumitomo is not a company of Japan and is not covered by Article VIII(1). That interpretation, and the identical position of the Government of Japan, is entitled to great weight. *Kolovrat* v. *Oregon*, 366 U. S. 187 (1961).

charged with their negotiation and enforcement is entitled to great weight. *Kolovrat* v. *Oregon*, 366 U. S. 187, 194 (1961).[11]

Our role is limited to giving effect to the intent of theTreaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.[12]

III

Sumitomo maintains that although the literal language of the Treaty supports the contrary interpretation, the intent of Japan and the United States was to cover subsidiaries regardless of their place of incorporation. We disagree.

Contrary to the view of the Court of Appeals and the claims of Sumitomo, adherence to the language of the Treaty would not "overlook the purpose of the Treaty." 638 F. 2d, at 556. The Friendship, Commerce and Navigation Treaty between Japan and the United States is but one of a series of similar commercial agreements negotiated after World War II.[13] The primary purpose of the corporation provisions of

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[11] Determining the nationality of a company by its place of incorporation is consistent with prior treaty practice. See Walker, 50 Am. J. Int'l L., *supra* n. 6, at 382–383. The place-of-incorporation rule also has the advantage of making determination of nationality a simple matter. On the other hand, application of a control test could certainly make nationality a subject of dispute.

[12] We express no view, of course, as to the interpretation of other Friendship, Commerce and Navigation Treaties which, although similarly worded, may have different negotiating histories.

[13] See, *e. g.*, Treaties of Friendship, Commerce and Navigation with China, 63 Stat. 1299, T. I. A. S. No. 1871 (1946); Italy, 63 Stat. 2255, T. I. A. S. No. 1965 (1948); Israel, [1954] 5 U. S. T. 550, T. I. A. S. No. 551 (1951); Greece, [1954] 5 U. S. T. 1829, T. I. A. S. No. 3057 (1951); Japan, [1953] 4 U. S. T. 2063, T. I. A. S. No. 2863 (1953); Federal Republic of Germany, [1956] 7 U. S. T. 1839, T. I. A. S. No. 3593 (1954); The Netherlands, [1957] 8 U. S. T. 2043, T. I. A. S. No. 3942 (1956); and Pakistan, [1961] 12 U. S. T. 110, T. I. A. S. No. 4683 (1959). The provisions of several of the treaties are compared in tabular form in Commercial Trea-

the Treaties was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms. Although the United States negotiated commercial treaties as early as 1778, and thereafter throughout the 19th century and early 20th century,[14] these early commercial treaties were primarily concerned with the trade and shipping rights of individuals. Until the 20th century, international commerce was much more an individual than a corporate affair.[15]

As corporate involvement in international trade expanded in this century, old commercial treaties became outmoded. Because "corporation[s] can have no legal existence out of the boundaries of the sovereignty by which [they are] created," *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588 (1839), it became necessary to negotiate new treaties granting corporations legal status and the right to function abroad. A series of Treaties negotiated before World War II gave corporations legal status and access to foreign courts,[16] but it was not until the

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ties: Hearing on Treaties of Friendship, Commerce and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany, and Japan, before the Subcommittee of the Senate Committee on Foreign Relations, 83d Cong., 1st Sess., 7–17 (1953).

[14] See, *e. g.*, Treaty of Amity and Commerce with France, 8 Stat. 12, T. S. No. 83 (1778); Treaty of Amity, Commerce and Navigation with Great Britain, 8 Stat. 116, T. S. No. 105 (1794); Treaty of Commerce and Friendship with Sweden and Norway, 8 Stat. 232, T. S. No. 347 (1816); Treaty of Commerce and Navigation with the Netherlands, 8 Stat. 524, T. S. No. 251 (1839); Treaty of Commerce and Navigation with Belgium, 8 Stat. 606, T. S. No. 19 (1845); Treaty of Commerce and Navigation with Italy, 17 Stat. 845, T. S. No. 177 (1871); Treaty of Commerce with Spain, 23 Stat. 750, T. S. No. 337 (1884); Treaty of Commerce with Germany, 31 Stat. 1935, T. S. No. 101 (1900); Treaty of Commerce with China, 33 Stat. 2208, T. S. No. 430 (1903).

[15] See Walker, 50 Am. J. Int'l L., *supra* n. 6, at 374–378.

[16] Treaty of Commerce and Navigation with Japan, 37 Stat. 1504, T. S. No. 558 (1911); Treaties of Friendship, Commerce and Consular Rights

postwar Friendship, Commerce and Navigation Treaties that United States corporations gained the right to conduct business in other countries.[17] The purpose of the Treaties was

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with Germany, 44 Stat. 2132, T. S. No. 725 (1923); Estonia, 44 Stat. 2379, T. S. No. 736 (1925); Hungary, 44 Stat. 2441, T. S. No. 748 (1925); El Salvador, 46 Stat. 2817, T. S. No. 827 (1926); Honduras, 45 Stat. 2618, T. S. No. 764 (1927); Latvia, 45 Stat. 2641, T. S. No. 765 (1928); Austria, 47 Stat. 1876, T. S. No. 838 (1928); Norway, 47 Stat. 2135, T. S. No. 852 (1928); Poland, 48 Stat. 1507, T. S. No. 862 (1931); Finland, 49 Stat. 2659, T. S. No. 868 (1934); Treaties of Friendship, Commerce and Navigation with Siam, 53 Stat. 1731, T. S. No. 940 (1937); Liberia, 54 Stat. 1739, T. S. No. 956 (1938).

These rights given to corporations by these Treaties were quite limited. For example, Article VII of the 1911 Treaty with Japan provided:

"Limited liability and other companies and associations . . . already or hereafter to be organized in accordance with the laws of either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.

"The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof." 37 Stat. 1506. A similarly limited provision was contained in the other Treaties.

[17] The significance of this advance was emphasized in the Senate hearings on an early set of postwar Friendship, Commerce and Navigation Treaties:

"Perhaps the most striking advance of the postwar treaties is the cognizance taken of the widespread use of the corporate form of business organization in present-day economic affairs. In the treaties antedating World War II American corporations were specifically assured only small protection against possible discriminatory treatment in foreign countries. In the postwar treaties, however, corporations are accorded essentially the same treaty rights as individuals in such vital matters as the right to do business, taxation on a nondiscriminatory basis, the acquisition and enjoyment of real and personal property, and the application of exchange controls. Furthermore, the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the other country and controlling and managing the affairs of such local companies." Commercial Treaties: Hearing on Treaties of

not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.

The Treaties accomplished their purpose by granting foreign corporations "national treatment" [18] in most respects and by allowing foreign individuals and companies to form locally incorporated subsidiaries. These local subsidiaries are considered for purposes of the Treaty to be companies of the country in which they are incorporated; they are entitled to the rights, and subject to the responsibilities of other domestic corporations. By treating these subsidiaries as domestic companies, the purpose of the Treaty provisions—to assure that corporations of one Treaty party have the right to conduct business within the territory of the other party without suffering discrimination as an alien entity—is fully met.

Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark and Greece before a Subcommittee of the Senate Committee on Foreign Relations, 82d Cong., 2d Sess., 4–5 (1952) (opening statement of Harold Linder, Deputy Assistant Secretary of State for Economic Affairs).

[18] "National treatment" is defined in Article XXII(1) of the Treaty:

"The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party."

In short, national treatment of corporations means equal treatment with domestic corporations. It is ordinarily the highest level of protection afforded by commercial treaties. In certain areas treaty parties are unwilling to grant full national treatment; in those areas the parties frequently grant "most-favored-nation treatment," which means treatment no less favorable than that accorded to nationals or companies of any third country. See Article XXII(2) of the Treaty. "The most-favored-nation rule can now, therefore, imply or allow the status of alien disability rather than of favor. In applicable situations nowadays, the first-class treatment tends to be national treatment; that which the citizens of the country enjoy." Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 Minn. L. Rev. 805, 811 (1958).

Nor can we agree with the Court of Appeals view that literal interpretation of the Treaty would create a "crazy-quilt pattern" in which the rights of branches of Japanese companies operating directly in the United States would be greatly superior to the right of locally incorporated subsidiaries of Japanese companies. 638 F. 2d, at 556. The Court of Appeals maintained that if such subsidiaries were not considered companies of Japan under the Treaty, they, unlike branch offices of Japanese corporations, would be denied access to the legal system, would be left unprotected against unlawful entry and molestation, and would be unable to dispose of property, obtain patents, engage in importation and exportation, or make payments, remittances, and transfers of funds. *Ibid.* That this is not the case is obvious; the subsidiaries, as companies of the United States, would enjoy all of those rights and more. The only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1).

IV

We are persuaded, as both signatories agree, that under the literal language of Article XXII(3) of the Treaty, Sumitomo is a company of the United States; we discern no reason to depart from the plain meaning of the Treaty language. Accordingly, we hold that Sumitomo is not a company of Japan and is thus not covered by Article VIII(1) of the Treaty.[19] The judgment of the Court of Appeals is va-

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[19] We express no view as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions at Sumitomo or as to whether a business necessity defense may be available. There can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country. However, the Court of Appeals found the evidentiary record insufficient to determine whether Japanese citizenship was a bona fide occupational qualification for any of Sumitomo's positions within the reach of Article VIII(1). Nor did it discuss the bona fide occupational

cated, and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

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qualification exception in relation to respondents' sex discrimination claim or the possibility of a business necessity defense. Whether Sumitomo can support its assertion of a bona fide occupational qualification or a business necessity defense is not before us. See n. 4, *supra*.

We also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent.

Syllabus

DIEDRICH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80–2204. Argued February 24, 1982—Decided June 15, 1982

Held: A donor (such as petitioner husband and wife and petitioner executor's decedent) who makes a gift of property on condition that the donee pay the resulting gift taxes realizes taxable income to the extent that the gift taxes paid by the donee exceed the donor's adjusted basis in the property. Pp. 194–200.

(a) The substance, not the form, of the agreed transaction controls in determining whether taxable income was realized. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716; *Crane* v. *Commissioner*, 331 U. S. 1. Pp. 194–196.

(b) When a donor makes a gift, he incurs a "debt" to the United States for the amount of whatever gift taxes are due, which are as much the donor's legal obligation as his income taxes. When conditional gifts, such as those in question here, are made, the donor realizes an immediate economic benefit by the donee's assumption of the donor's legal obligation to pay the gift taxes. Subjective intent, while relevant in determining whether a gift has been made, is not characteristically a factor in determining whether an individual has realized income. Even if intent were a factor, the donor's intent as to the condition shifting the gift tax obligation to the donee is plainly to relieve the donor of the debt owed to the United States. And the economic benefit realized by the donor is not diminished by the fact that the liability attaches during the course of the donative transfer, such benefit being indistinguishable from the benefit arising from discharge of a pre-existing obligation. Pp. 196–198.

(c) Treating the amount by which the gift taxes exceed the donor's adjusted basis in the property as income is consistent with § 1001 of the Internal Revenue Code, which provides that the gain from the disposition of property is the excess of the amount realized over the transferor's adjusted basis in the property. Pp. 198–199.

643 F. 2d 499, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 200.

Norman E. Beal argued the cause and filed a brief for petitioners.

Stuart A. Smith argued the cause for respondent. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Archer*, *Jonathan S. Cohen*, and *Gilbert S. Rothenberg*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a Circuit conflict as to whether a donor who makes a gift of property on condition that the donee pay the resulting gift tax receives taxable income to the extent that the gift tax paid by the donee exceeds the donor's adjusted basis in the property transferred. 454 U. S. 813 (1981). The United States Court of Appeals for the Eighth Circuit held that the donor realized income. 643 F. 2d 499 (1981). We affirm.

I

A

Diedrich v. *Commissioner of Internal Revenue*

In 1972 petitioners Victor and Frances Diedrich made gifts of approximately 85,000 shares of stock to their three children, using both a direct transfer and a trust arrangement. The gifts were subject to a condition that the donees pay the resulting federal and state gift taxes. There is no dispute concerning the amount of the gift tax paid by the donees. The donors' basis in the transferred stock was $51,073; the gift tax paid in 1972 by the donees was $62,992. Petitioners did not include as income on their 1972 federal income tax returns any portion of the gift tax paid by the donees. After

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**William Waller* filed a brief for Ralph Owen et al. as *amici curiae* urging reversal.

Joseph C. Niebler filed a brief for Laird C. Cleaver et ux. as *amici curiae*.

an audit the Commissioner of Internal Revenue determined that petitioners had realized income to the extent that the gift tax owed by petitioners but paid by the donees exceeded the donors' basis in the property. Accordingly, petitioners' taxable income for 1972 was increased by $5,959.[1] Petitioners filed a petition in the United States Tax Court for redetermination of the deficiencies. The Tax Court held for the taxpayers, concluding that no income had been realized. 39 TCM 433 (1979).

B

United Missouri Bank of Kansas City v. *Commissioner of Internal Revenue*

In 1970 and 1971 Mrs. Frances Grant gave 90,000 voting trust certificates to her son on condition that he pay the resulting gift tax. Mrs. Grant's basis in the stock was $8,742.60; the gift tax paid by the donee was $232,620.09 As in *Diedrich*, there is no dispute concerning the amount of the gift tax or the fact of its payment by the donee pursuant to the condition.

Like the Diedrichs, Mrs. Grant did not include as income on her 1970 or 1971 federal income tax returns any portion of the amount of the gift tax owed by her but paid by the donee. After auditing her returns, the Commissioner determined that the gift of stock to her son was part gift and part sale, with the result that Mrs. Grant realized income to the extent that the amount of the gift tax exceeded the adjusted basis in the property. Accordingly, Mrs. Grant's taxable income was increased by approximately $112,000.[2] Mrs. Grant filed

[1] Subtracting the stock basis of $51,073 from the gift tax paid by the donees of $62,992, the Commissioner found that petitioners had realized a long-term capital gain of $11,919. After a 50% reduction in long-term capital gain, 26 U. S. C. § 1202, the Diedrichs' taxable income increased by $5,959.

[2] The gift taxes were $232,630.09. Subtracting the adjusted basis of $8,742.60, the Commissioner found that Mrs. Grant realized a long-term capital gain of $223,887.49. After a 50% reduction for long-term capital

a petition in the United States Tax Court for redetermination of the deficiencies. The Tax Court held for the taxpayer, concluding that no income had been realized. *Grant* v. *Commissioner*, 39 TCM 1088 (1980).

C

The United States Court of Appeals for the Eighth Circuit consolidated the two appeals and reversed, concluding that "to the extent the gift taxes paid by donees" exceeded the donors' adjusted bases in the property transferred, "the donors realized taxable income." 643 F. 2d, at 504. The Court of Appeals rejected the Tax Court's conclusion that the taxpayers merely had made a "net gift" of the difference between the fair market value of the transferred property and the gift taxes paid by the donees. The court reasoned that a donor receives a benefit when a donee discharges a donor's legal obligation to pay gift taxes. The Court of Appeals agreed with the Commissioner in rejecting the holding in *Turner* v. *Commissioner*, 49 T. C. 356 (1968), aff'd *per curiam*, 410 F. 2d 752 (CA6 1969), and its progeny, and adopted the approach of *Johnson* v. *Commissioner*, 59 T. C. 791 (1973), aff'd, 495 F. 2d 1079 (CA6), cert. denied, 419 U. S. 1040 (1974), and *Estate of Levine* v. *Commissioner*, 72 T. C. 780 (1979), aff'd, 634 F. 2d 12 (CA2 1980). We granted certiorari to resolve this conflict, and we affirm.

II

A

Pursuant to its constitutional authority, Congress has defined "gross income" as income "from whatever source derived," including "[i]ncome from discharge of indebtedness."

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gain, 26 U. S. C. § 1202, Mrs. Grant's taxable income increased by $111,943.75.

During pendency of this lawsuit, Mrs. Grant died and the United Missouri Bank of Kansas City, the decedent's executor, was substituted as petitioner.

26 U. S. C. § 61 (12).[3] This Court has recognized that "income" may be realized by a variety of indirect means. In *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716 (1929), the Court held that payment of an employee's income taxes by an employer constituted income to the employee. Speaking for the Court, Chief Justice Taft concluded that "[t]he payment of the tax by the employe[r] was in consideration of the services rendered by the employee and was a gain derived by the employee from his labor." *Id.*, at 729. The Court made clear that the substance, not the form, of the agreed transaction controls. "The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed." *Ibid.* The employee, in other words, was placed in a better position as a result of the employer's discharge of the employee's legal obligation to pay the income taxes; the employee thus received a gain subject to income tax.

The holding in *Old Colony* was reaffirmed in *Crane* v. *Commissioner*, 331 U. S. 1 (1947). In *Crane* the Court concluded that relief from the obligation of a nonrecourse mortgage in which the value of the property exceeded the value of the mortgage constituted income to the taxpayer. The taxpayer in *Crane* acquired depreciable property, an apartment building, subject to an unassumed mortgage. The taxpayer later sold the apartment building, which was still subject to the nonrecourse mortgage, for cash plus the buyer's assump-

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[3] The United States Constitution provides that Congress shall have the power to lay and collect taxes on income "from whatever source derived." Art. I, § 8, cl. 1; Amdt. 16.

In *Helvering* v. *Bruun*, 309 U. S. 461, 469 (1940), the Court noted:

"While it is true that economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset. Gain may occur as a result of exchange of property, *payment of the taxpayer's indebtedness, relief from a liability*, or other profit realized from the completion of a transaction." (Emphasis supplied.)

tion of the mortgage. This Court held that the amount of the mortgage was properly included in the amount realized on the sale, noting that if the taxpayer transfers subject to the mortgage,

> "the benefit to him is as real and substantial as if the mortgage were discharged, or as if a personal debt in an equal amount had been assumed by another." *Id.*, at 14.[4]

Again, it was the "reality," not the form, of the transaction that governed. *Ibid.* The Court found it immaterial whether the seller received money prior to the sale in order to discharge the mortgage, or whether the seller merely transferred the property subject to the mortgage. In either case the taxpayer realized an economic benefit.

B

The principles of *Old Colony* and *Crane* control.[5] A common method of structuring gift transactions is for the donor

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[4] In *Crane* the taxpayer received favorable tax treatment for the loan and was allowed depreciation on the property. The Court concluded that the taxpayer could not then later escape taxation after having received these benefits when the loan obligation was assumed by another.

Whether income would have been realized in *Crane* if the value of the property at the time of transfer had been less than the amount of the mortgage need not be considered here. See *Crane*, 331 U. S., at 14, n. 37.

[5] Although the Commissioner has argued consistently that payment of gift taxes by the donee results in income to the donor, several courts have rejected this interpretation. See, *e. g.*, *Turner* v. *Commissioner*, 49 T. C. 356 (1968), aff'd *per curiam*, 410 F. 2d 752 (CA6 1969); *Hirst* v. *Commissioner*, 572 F. 2d 427 (CA4 1978) (en banc). Cf. *Johnson* v. *Commissioner*, 495 F. 2d 1079 (CA6), cert. denied, 419 U. S. 1040 (1974).

It should be noted that the *gift* tax consequences of a conditional gift will be unaffected by the holding in this case. When a conditional "net" gift is given, the gift tax attributable to the transfer is to be deducted from the value of the property in determining the value of the gift at the time of transfer. See Rev. Rul. 75–72, 1975–1 Cum. Bull. 310 (general formula for computation of gift tax on conditional gift); Rev. Rul. 71–232, 1971–1 Cum. Bull. 275.

to make the gift subject to the condition that the donee pay the resulting gift tax, as was done in each of the cases now before us. When a gift is made, the gift tax liability falls on the donor under 26 U. S. C. § 2502(d).[6] When a donor makes a gift to a donee, a "debt" to the United States for the amount of the gift tax is incurred by the donor. Those taxes are as much the legal obligation of the donor as the donor's income taxes; for these purposes they are the same kind of debt obligation as the income taxes of the employee in *Old Colony*, *supra*. Similarly, when a donee agrees to discharge an indebtedness in consideration of the gift, the person relieved of the tax liability realizes an economic benefit. In short, the donor realizes an immediate economic benefit by the donee's assumption of the donor's legal obligation to pay the gift tax.

An examination of the donor's intent does not change the character of this benefit. Although intent is relevant in determining whether a gift has been made, subjective intent has not characteristically been a factor in determining whether an individual has realized income.[7] Even if intent

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[6] "The tax imposed by section 2501 shall be paid by the donor."

Section 6321 imposes a lien on the personal property of the donor when a tax is not paid when due. The donee is secondarily responsible for payment of the gift tax should the donor fail to pay the tax. 26 U. S. C. § 6324(b). The donee's liability, however, is limited to the value of the gift. *Ibid.* This responsibility of the donee is analogous to a lien or security. *Ibid.* See also S. Rep. No. 665, 72d Cong., 1st Sess., 42 (1932); H. R. Rep. No. 708, 72d Cong., 1st Sess., 30 (1932).

[7] Several courts have found it highly significant that the donor intended to make a gift. *Turner* v. *Commissioner*, *supra*; *Hirst* v. *Commissioner*, *supra*. It is not enough, however, to state that the donor intended simply to make a gift of the amount which will remain after the donee pays the gift tax. As noted above, subjective intent has not characteristically been a factor in determining whether an individual has realized income. In *Commissioner* v. *Duberstein*, 363 U. S. 278, 286 (1960), the Court noted that "the donor's characterization of his action is not determinative." See also *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, 613 (1938) ("A given result at the end of a straight path is not made a different result because reached by following a devious path").

were a factor, the donor's intent with respect to the condition shifting the gift tax obligation from the donor to the donee was plainly to relieve the donor of a debt owed to the United States; the choice was made because the donor would receive a benefit in relief from the obligation to pay the gift tax.[8]

Finally, the benefit realized by the taxpayer is not diminished by the fact that the liability attaches during the course of a donative transfer. It cannot be doubted that the donors were aware that the gift tax obligation would arise immediately upon the transfer of the property; the economic benefit to the donors in the discharge of the gift tax liability is indistinguishable from the benefit arising from discharge of a preexisting obligation. Nor is there any doubt that had the donors sold a portion of the stock immediately before the gift transfer in order to raise funds to pay the expected gift tax, a taxable gain would have been realized. 26 U. S. C. § 1001. The fact that the gift tax obligation was discharged by way of a conditional gift rather than from funds derived from a pregift sale does not alter the underlying benefit to the donors.

C

Consistent with the economic reality, the Commissioner has treated these conditional gifts as a discharge of indebtedness through a part gift and part sale of the gift property transferred. The transfer is treated as if the donor sells the property to the donee for less than the fair market value. The "sale" price is the amount necessary to discharge the gift

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[8] The existence of the "condition" that the gift will be made only if the donee assumes the gift tax consequences precludes any characterization that the payment of the taxes was simply a gift from the donee back to the donor.

A conditional gift not only relieves the donor of the gift tax liability, but also may enable the donor to transfer a larger sum of money to the donee than would otherwise be possible due to such factors as differing income tax brackets of the donor and donee.

tax indebtedness; the balance of the value of the transferred property is treated as a gift. The gain thus derived by the donor is the amount of the gift tax liability less the donor's adjusted basis in the entire property. Accordingly, income is realized to the extent that the gift tax exceeds the donor's adjusted basis in the property. This treatment is consistent with § 1001 of the Internal Revenue Code, which provides that the gain from the disposition of property is the excess of the amount realized over the transferor's adjusted basis in the property.[9]

III

We recognize that Congress has structured gift transactions to encourage transfer of property by limiting the tax consequences of a transfer. See, *e. g.*, 26 U. S. C. § 102 (gifts excluded from donee's gross income). Congress may obviously provide a similar exclusion for the conditional gift. Should Congress wish to encourage "net gifts," changes in the income tax consequences of such gifts lie within the legislative responsibility. Until such time, we are bound by Congress' mandate that gross income includes income "from whatever source derived." We therefore hold that a donor who makes a gift of property on condition that the donee pay the resulting gift taxes realizes taxable income to the extent

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[9] Section 1001 provides:

"(a) *Computation of gain or loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

"(b) *Amount realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. . . ."

"By treating conditional gifts as a part gift and part sale, income is realized only when highly appreciated property is transferred, for only highly appreciated property will result in a gift tax greater than the adjusted basis."

that the gift taxes paid by the donee exceed the donor's adjusted basis in the property.[10]

The judgment of the United States Court of Appeals for the Eighth Circuit is

Affirmed.

JUSTICE REHNQUIST, dissenting.

It is a well-settled principle today that a taxpayer realizes income when another person relieves the taxpayer of a legal obligation in connection with an otherwise taxable transaction. See *Crane* v. *Commissioner*, 331 U. S. 1 (1947) (sale of real property); *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716 (1929) (employment compensation). In neither *Old Colony* nor *Crane* was there any question as to the existence of a taxable transaction; the only question concerned the amount of income realized by the taxpayer as a result of the taxable transaction. The Court in this case, however, begs the question of whether a taxable transaction has taken place at all when it concludes that "[t]he principles of *Old Colony* and *Crane* control" this case. *Ante*, at 196.

In *Old Colony*, the employer agreed to pay the employee's federal tax liability as part of his compensation. The employee provided his services to the employer in exchange for compensation. The exchange of compensation for services was undeniably a taxable transaction. The only question was whether the employee's taxable income included the employer's assumption of the employee's income tax liability.

In *Crane*, the taxpayer sold real property for cash plus the buyer's assumption of a mortgage. Clearly a sale had occurred, and the only question was whether the amount of the

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[10] Petitioners argue that even if this Court holds that a donor realizes income on a conditional gift to the extent that the gift tax exceeds the adjusted basis, that holding should be applied prospectively and should not apply to the taxpayers in this case. In this case, however, there was no dispositive Eighth Circuit holding prior to the decision on review. In addition, this Court frequently has applied decisions which have altered the tax law and applied the clarified law to the facts of the case before it. See, *e. g.*, *United States* v. *Estate of Donnelly*, 397 U. S. 286, 294–295 (1970).

mortgage assumed by the buyer should be included in the amount realized by the taxpayer. The Court rejected the taxpayer's contention that what she sold was not the property itself, but her equity in that property.

Unlike *Old Colony* or *Crane*, the question in this case is not the amount of income the taxpayer has realized as a result of a concededly taxable transation, but whether a taxable transaction has taken place at all. Only *after* one concludes that a partial sale occurs when the donee agrees to pay the gift tax do *Old Colony* and *Crane* become relevant in ascertaining the amount of income realized by the donor as a result of the transaction. Nowhere does the Court explain why a gift becomes a partial sale merely because the donor and donee structure the gift so that the gift tax imposed by Congress on the transaction is paid by the donee rather than the donor.

In my view, the resolution of this case turns upon congressional intent: whether Congress intended to characterize a gift as a partial sale whenever the donee agrees to pay the gift tax. Congress has determined that a gift should not be considered income to the donee. 26 U. S. C. § 102. Instead, gift transactions are to be subject to a tax system wholly separate and distinct from the income tax. See 26 U. S. C. § 2501 *et seq.* Both the donor and the donee may be held liable for the gift tax. §§ 2502(d), 6324(b). Although the primary liability for the gift tax is on the donor, the donee is liable to the extent of the value of the gift should the donor fail to pay the tax. I see no evidence in the tax statutes that Congress forbade the parties to agree among themselves as to who would pay the gift tax upon pain of such an agreement being considered a taxable event for the purposes of the income tax. Although Congress could certainly determine that the payment of the gift tax by the donee constitutes income to the donor, the relevant statutes do not affirmatively indicate that Congress has made such a determination.

I dissent.

PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80–1538. Argued December 1, 1981—Decided June 15, 1982*

Held: A Texas statute which withholds from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 210–230.

(a) The illegal aliens who are plaintiffs in these cases challenging the statute may claim the benefit of the Equal Protection Clause, which provides that no State shall "deny to *any person within its jurisdiction* the equal protection of the laws." Whatever his status under the immigration laws, an alien is a "person" in any ordinary sense of that term. This Court's prior cases recognizing that illegal aliens are "persons" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, which Clauses do not include the phrase "within its jurisdiction," cannot be distinguished on the asserted ground that persons who have entered the country illegally are not "within the jurisdiction" of a State even if they are present within its boundaries and subject to its laws. Nor do the logic and history of the Fourteenth Amendment support such a construction. Instead, use of the phrase "within its jurisdiction" confirms the understanding that the Fourteenth Amendment's protection extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory. Pp. 210–216.

(b) The discrimination contained in the Texas statute cannot be considered rational unless it furthers some substantial goal of the State. Although undocumented resident aliens cannot be treated as a "suspect class," and although education is not a "fundamental right," so as to require the State to justify the statutory classification by showing that it serves a compelling governmental interest, nevertheless the Texas statute imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. These children can neither affect their parents' conduct nor their own undocumented status. The depri-

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*Together with No. 80–1934, *Texas et al.* v. *Certain Named and Unnamed Undocumented Alien Children et al.*, also on appeal from the same court.

vation of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage; the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement. In determining the rationality of the Texas statute, its costs to the Nation and to the innocent children may properly be considered. Pp. 216–224.

(c) The undocumented status of these children *vel non* does not establish a sufficient rational basis for denying them benefits that the State affords other residents. It is true that when faced with an equal protection challenge respecting a State's differential treatment of aliens, the courts must be attentive to congressional policy concerning aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the legislative record, no national policy is perceived that might justify the State in denying these children an elementary education. Pp. 224–226.

(d) Texas' statutory classification cannot be sustained as furthering its interest in the "preservation of the state's limited resources for the education of its lawful residents." While the State might have an interest in mitigating potentially harsh economic effects from an influx of illegal immigrants, the Texas statute does not offer an effective method of dealing with the problem. Even assuming that the net impact of illegal aliens on the economy is negative, charging tuition to undocumented children constitutes an ineffectual attempt to stem the tide of illegal immigration, at least when compared with the alternative of prohibiting employment of illegal aliens. Nor is there any merit to the suggestion that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. The record does not show that exclusion of undocumented children is likely to improve the overall quality of education in the State. Neither is there any merit to the claim that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the State's boundaries and to put their education to productive social or political use within the State. Pp. 227–230.

No. 80–1538, 628 F. 2d 448, and No. 80–1934, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. MARSHALL, J., *post*, p. 230, BLACKMUN, J., *post*, p. 231, and POWELL, J., *post*, p. 236, filed concurring opinions. BURGER, C. J., filed a dissenting opinion, in which WHITE, REHNQUIST, and O'CONNOR, JJ., joined, *post*, p. 242.

John C. Hardy argued the cause for appellants in No. 80–1538. *Richard Arnett*, Assistant Attorney General of Texas, argued the cause for appellants in No. 80–1934. With them on the briefs were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, and *Richard E. Gray III*, Executive Assistant Attorney General.

Peter D. Roos argued the cause for appellees in No. 80–1538. With him on the brief were *Larry Daves* and *Vilma S. Martinez*. *Peter A. Schey* argued the cause for appellees in No. 80–1934. With him on the briefs were *Al Campos*, *Larry Mealer*, and *Jane Swanson*.

Solicitor General Lee, *Assistant Attorney General Reynolds*, and *Edwin S. Kneedler* filed a brief for the United States in No. 80–1934 and for the United States as *amicus curiae* in No. 80–1538.†

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†Briefs of *amici curiae* urging reversal in both bases were filed by *Travis Hiester*, *Orrin W. Johnson*, *Neal King*, and *Tony Martinez* for the Harlingen Consolidated Independent School District et al.; and by *John S. Aldridge* for the Texas Association of School Boards. *Ronald A. Zumbrun* and *John H. Findley* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal in No. 80–1538.

Briefs of *amici curiae* urging affirmance in both cases were filed by *James J. Orlow* for the American Immigration Lawyers Association; by *Samuel Rabinove* for the American Jewish Committee; by *Bill Lann Lee* for the Asian American Legal Defense and Education Fund; by the Edgewood Independent School District; by *Peter B. Sandmann* for the Legal Aid Society of San Francisco; by *Michael K. Suarez* for the Mexican American Bar Association of Houston; by *Robert J. Kenney, Jr.*, for the National Education Association et al.; by *Fred Fuchs* for Texas Impact; and by *Daniel Marcus* and *John F. Cooney* for the Washington Lawyers' Committee for Civil Rights Under Law et al. *Thomas M. Griffin* filed a brief for the California State Board of Education as *amicus curiae* urging affirmance in No. 80–1538.

Briefs of *amici curiae* in both cases were filed by *Joseph C. Zengerle* for the Federation for American Immigration Reform; by *David Crump* for the Legal Foundation of America; and by *Roger J. Marzulla* and *Maxwell A. Miller* for the Mountain States Legal Foundation.

Briefs of *amici curiae* in No. 80–1934 were filed by *Joyce D. Miller* for the American Friends Service Committee et al.; and by *Gwendolyn H.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.

I

Since the late 19th century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, 8 U. S. C. § 1325, and those who have entered unlawfully are subject to deportation, 8 U. S. C. §§ 1251, 1252 (1976 ed. and Supp. IV). But despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now live within various States, including the State of Texas.

In May 1975, the Texas Legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not "legally admitted" into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not "legally admitted" to the country. Tex. Educ. Code Ann. § 21.031 (Vernon Supp. 1981).[1] These cases involve constitutional challenges to those provisions.

Gregory, *Thomas A. Shannon*, and *August W. Steinhilber* for the National School Boards Association.

[1] That section provides, in pertinent part:

"(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

"(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district

No. 80–1538

Plyler v. *Doe*

This is a class action, filed in the United States District Court for the Eastern District of Texas in September 1977, on behalf of certain school-age children of Mexican origin residing in Smith County, Tex., who could not establish that they had been legally admitted into the United States. The action complained of the exclusion of plaintiff children from the public schools of the Tyler Independent School District.[2] The Superintendent and members of the Board of Trustees of the School District were named as defendants; the State of Texas intervened as a party-defendant. After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District, the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class. In December 1977, the court conducted an extensive hearing on plaintiffs' motion for permanent injunctive relief.

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in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

"(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district."

[2] Despite the enactment of § 21.031 in 1975, the School District had continued to enroll undocumented children free of charge until the 1977–1978 school year. In July 1977, it adopted a policy requiring undocumented children to pay a "full tuition fee" in order to enroll. Section 21.031 had not provided a definition of "a legally admitted alien." Tyler offered the following clarification:

"A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation." App. to Juris. Statement in No. 80–1538, p. A–38.

In considering this motion, the District Court made extensive findings of fact. The court found that neither § 21.031 nor the School District policy implementing it had "either the purpose or effect of keeping illegal aliens out of the State of Texas." 458 F. Supp. 569, 575 (1978). Respecting defendants' further claim that § 21.031 was simply a financial measure designed to avoid a drain on the State's fisc, the court recognized that the increases in population resulting from the immigration of Mexican nationals into the United States had created problems for the public schools of the State, and that these problems were exacerbated by the special educational needs of immigrant Mexican children. The court noted, however, that the increase in school enrollment was primarily attributable to the admission of children who were legal residents. *Id.*, at 575–576. It also found that while the "exclusion of all undocumented children from the public schools in Texas would eventually result in economies at some level," *id.*, at 576, funding from both the State and Federal Governments was based primarily on the number of children enrolled. In net effect then, barring undocumented children from the schools would save money, but it would "not necessarily" improve "the quality of education." *Id.*, at 577. The court further observed that the impact of § 21.031 was borne primarily by a very small subclass of illegal aliens, "entire families who have migrated illegally and—for all practical purposes—permanently to the United States." *Id.*, at 578.[3] Finally, the court noted that under current laws and practices "the illegal alien of today may well be the legal alien of tomorrow,"[4] and that without an education, these undocu-

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[3] The court contrasted this group with those illegal aliens who entered the country alone in order to earn money to send to their dependents in Mexico, and who in many instances remained in this country for only a short period of time. 458 F. Supp., at 578.

[4] Plaintiffs' expert, Dr. Gilbert Cardenas, testified that "fifty to sixty per cent . . . of current legal alien workers were formerly illegal aliens." *Id.*, at 577. A defense witness, Rolan Heston, District Director of the Hous-

mented children, "[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class." *Id.*, at 577.

The District Court held that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, and that § 21.031 violated that Clause. Suggesting that "the state's exclusion of undocumented children from its public schools . . . may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed," the court held that it was unnecessary to decide whether the statute would survive a "strict scrutiny" analysis because, in any event, the discrimination embodied in the statute was not supported by a rational basis. *Id.*, at 585. The District Court also concluded that the Texas statute violated the Supremacy Clause.[5] *Id.*, at 590–592.

The Court of Appeals for the Fifth Circuit upheld the District Court's injunction. 628 F. 2d 448 (1980). The Court of Appeals held that the District Court had erred in finding the Texas statute pre-empted by federal law.[6] With respect to

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ton District of the Immigration and Naturalization Service, testified that "undocumented children can and do live in the United States for years, and adjust their status through marriage to a citizen or permanent resident." *Ibid.* The court also took notice of congressional proposals to "legalize" the status of many unlawful entrants. *Id.*, at 577–578. See also n. 17, *infra*.

[5] The court found § 21.031 inconsistent with the scheme of national regulation under the Immigration and Nationality Act, and with federal laws pertaining to funding and discrimination in education. The court distinguished *De Canas* v. *Bica*, 424 U. S. 351 (1976), by emphasizing that the state bar on employment of illegal aliens involved in that case mirrored precisely the federal policy, of protecting the domestic labor market, underlying the immigration laws. The court discerned no express federal policy to bar illegal immigrants from education. 458 F. Supp., at 590–592.

[6] The Court of Appeals noted that *De Canas* v. *Bica*, *supra*, had not foreclosed all state regulation with respect to illegal aliens, and found no express or implied congressional policy favoring the education of illegal aliens. The court therefore concluded that there was no pre-emptive conflict between state and federal law. 628 F. 2d, at 451–454.

equal protection, however, the Court of Appeals affirmed in all essential respects the analysis of the District Court, *id.*, at 454–458, concluding that § 21.031 was "constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test," *id.*, at 458. We noted probable jurisdiction. 451 U. S. 968 (1981).

No. 80–1934

In re Alien Children Education Litigation

During 1978 and 1979, suits challenging the constitutionality of § 21.031 and various local practices undertaken on the authority of that provision were filed in the United States District Courts for the Southern, Western, and Northern Districts of Texas. Each suit named the State of Texas and the Texas Education Agency as defendants, along with local officials. In November 1979, the Judicial Panel on Multidistrict Litigation, on motion of the State, consolidated the claims against the state officials into a single action to be heard in the District Court for the Southern District of Texas. A hearing was conducted in February and March 1980. In July 1980, the court entered an opinion and order holding that § 21.031 violated the Equal Protection Clause of the Fourteenth Amendment. *In re Alien Children Education Litigation*, 501 F. Supp. 544.[7] The court held that "the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit." *Id.*, at 582. The court determined that the State's concern for fiscal integrity was not a compelling state interest, *id.*, at 582–583; that exclusion of these children had not been shown to be necessary to improve education within the State, *id.*, at 583; and that the educational needs of the children statutorily excluded were not different from the needs of children not excluded, *ibid.* The court therefore concluded that

[7] The court concluded that § 21.031 was not pre-empted by federal laws or international agreements. 501 F. Supp., at 584–596.

§ 21.031 was not carefully tailored to advance the asserted state interest in an acceptable manner. *Id.*, at 583–584. While appeal of the District Court's decision was pending, the Court of Appeals rendered its decision in No. 80–1538. Apparently on the strength of that opinion, the Court of Appeals, on February 23, 1981, summarily affirmed the decision of the Southern District. We noted probable jurisdiction, 452 U. S. 937 (1981), and consolidated this case with No. 80–1538 for briefing and argument.[8]

II

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws." (Emphasis added.) Appellants argue at the outset that undocumented aliens, because of their immigration status, are not "persons within the jurisdiction" of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments. *Shaughnessy* v. *Mezei*, 345 U. S. 206, 212 (1953); *Wong Wing* v. *United States*, 163 U. S. 228, 238 (1896); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1886). Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government. *Mathews* v. *Diaz*, 426 U. S. 67, 77 (1976).[9]

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[8] Appellees in both cases continue to press the argument that § 21.031 is pre-empted by federal law and policy. In light of our disposition of the Fourteenth Amendment issue, we have no occasion to reach this claim.

[9] It would be incongruous to hold that the United States, to which the Constitution assigns a broad authority over both naturalization and foreign affairs, is barred from invidious discrimination with respect to unlawful

Appellants seek to distinguish our prior cases, emphasizing that the Equal Protection Clause directs a State to afford its protection to persons *within its jurisdiction* while the Due Process Clauses of the Fifth and Fourteenth Amendments contain no such assertedly limiting phrase. In appellants' view, persons who have entered the United States illegally are not "within the jurisdiction" of a State even if they are present within a State's boundaries and subject to its laws. Neither our cases nor the logic of the Fourteenth Amendment supports that constricting construction of the phrase "within its jurisdiction."[10] We have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process. To the contrary, we have recognized

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aliens, while exempting the States from a similar limitation. See 426 U. S., at 84–86.

[10] Although we have not previously focused on the intended meaning of this phrase, we have had occasion to examine the first sentence of the Fourteenth Amendment, which provides that "[a]ll persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States . . . ." (Emphasis added.) Justice Gray, writing for the Court in *United States* v. *Wong Kim Ark*, 169 U. S. 649 (1898), detailed at some length the history of the Citizenship Clause, and the predominantly geographic sense in which the term "jurisdiction" was used. He further noted that it was "impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or to hold that persons 'within the jurisdiction' of one of the States of the Union are not 'subject to the jurisdiction of the United States.'" *Id.*, at 687.

Justice Gray concluded that "[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." *Id.*, at 693. As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment "jurisdiction" can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful. See C. Bouvé, Exclusion and Expulsion of Aliens in the United States 425–427 (1912).

that both provisions were fashioned to protect an identical class of persons, and to reach every exercise of state authority.

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' *These provisions are universal in their application, to all persons within the territorial jurisdiction,* without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws." *Yick Wo*, *supra*, at 369 (emphasis added).

In concluding that "all persons within the territory of the United States," including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State. *Wong Wing*, *supra*, at 238.[11] Our cases applying the Equal Protection Clause reflect the same territorial theme:[12]

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[11] In his separate opinion, Justice Field addressed the relationship between the Fifth and Fourteenth Amendments:

"The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws. . . . The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar—in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Wong Wing* v. *United States*, 163 U. S., at 242–243 (concurring in part and dissenting in part).

[12] *Leng May Ma* v. *Barber*, 357 U. S. 185 (1958), relied on by appellants, is not to the contrary. In that case the Court held, as a matter of statu-

> "Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders." *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 350 (1938).

There is simply no support for appellants' suggestion that "due process" is somehow of greater stature than "equal protection" and therefore available to a larger class of persons. To the contrary, each aspect of the Fourteenth Amendment reflects an elementary limitation on state power. To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.

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tory construction, that an alien paroled into the United States pursuant to § 212(d)(5) of the Immigration and Nationality Act, 8 U. S. C. § 1182(d)(5) (1952 ed.), was not "within the United States" for the purpose of availing herself of § 243(h), which authorized the withholding of deportation in certain circumstances. The conclusion reflected the longstanding distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings. The undocumented children who are appellees here, unlike the parolee in *Leng May Ma*, *supra*, could apparently be removed from the country only pursuant to deportation proceedings. 8 U. S. C. § 1251(a)(2). See 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure § 3.16b, p. 3–161 (1981).

Although the congressional debate concerning § 1 of the Fourteenth Amendment was limited, that debate clearly confirms the understanding that the phrase "within its jurisdiction" was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws. Indeed, it appears from those debates that Congress, by using the phrase "person within its jurisdiction," sought expressly to ensure that the equal protection of the laws was provided to the alien population. Representative Bingham reported to the House the draft resolution of the Joint Committee of Fifteen on Reconstruction (H. R. 63) that was to become the Fourteenth Amendment.[13] Cong. Globe, 39th Cong., 1st Sess., 1033 (1866). Two days later, Bingham posed the following question in support of the resolution:

> "Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, *whether citizens or strangers, within this land,* shall have equal protection in every State in this Union in the rights of life and liberty and property?" *Id.*, at 1090.

Senator Howard, also a member of the Joint Committee of Fifteen, and the floor manager of the Amendment in the Senate, was no less explicit about the broad objectives of the Amendment, and the intention to make its provisions applicable to all who "may happen to be" within the jurisdiction of a State:

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[13] Representative Bingham's views are also reflected in his comments on the Civil Rights Bill of 1866. He repeatedly referred to the need to provide protection, not only to the freedmen, but to "the alien and stranger," and to "refugees . . . and all men." Cong. Globe, 39th Cong., 1st Sess., 1292 (1866).

> "The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but *any person, whoever he may be*, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, *and to all persons who may happen to be within their jurisdiction.*" *Id.*, at 2766 (emphasis added).

Use of the phrase "within its jurisdiction" thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish.

Our conclusion that the illegal aliens who are plaintiffs in these cases may claim the benefit of the Fourteenth Amendment's guarantee of equal protection only begins the inquiry. The more difficult question is whether the Equal Protection Clause has been violated by the refusal of the State of Texas to reimburse local school boards for the education of children who cannot demonstrate that their presence within the

United States is lawful, or by the imposition by those school boards of the burden of tuition on those children. It is to this question that we now turn.

III

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920). But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class,"[14] or that impinge upon

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[14] Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice

the exercise of a "fundamental right."[15] With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a

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under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973); *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971); see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

[15] In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972), even though "the right to vote, *per se*, is not a constitutionally protected right." *San Antonio Independent School Dist.*, *supra*, at 35, n. 78. With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights. See *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 667 (1966); *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

substantial interest of the State.[16] We turn to a consideration of the standard appropriate for the evaluation of § 21.031.

A

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders.[17] This situation raises the specter of a perma-

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[16] See *Craig* v. *Boren*, 429 U. S. 190 (1976); *Lalli* v. *Lalli*, 439 U. S. 259 (1978). This technique of "intermediate" scrutiny permits us to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles. "In expounding the Constitution, the Court's role is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.'" *University of California Regents* v. *Bakke*, 438 U. S. 265, 299 (1978) (opinion of POWELL, J.), quoting A. Cox, The Role of the Supreme Court in American Government 114 (1976). Only when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this standard to aid us in determining the rationality of the legislative choice.

[17] The Attorney General recently estimated the number of illegal aliens within the United States at between 3 and 6 million. In presenting to both the Senate and House of Representatives several Presidential proposals for reform of the immigration laws—including one to "legalize" many of the illegal entrants currently residing in the United States by creating for them a special status under the immigration laws—the Attorney General noted that this subclass is largely composed of persons with a permanent attachment to the Nation, and that they are unlikely to be displaced from our territory:

"We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community. By granting limited legal status to the productive and law-abiding members of this shadow population, we will recognize reality and devote our enforcement resources to deterring future illegal arrivals." Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary

nent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.[18] The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[19]

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not ap-

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and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 9 (1981) (testimony of William French Smith, Attorney General).

[18] As the District Court observed in No. 80–1538, the confluence of Government policies has resulted in "the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them." 458 F. Supp., at 585.

[19] We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class, see, *e. g.*, n. 14, *supra*, has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy." With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction. See *De Canas* v. *Bica*, 424 U. S. 351 (1976).

ply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." *Trimble* v. *Gordon*, 430 U. S. 762, 770 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

> "[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972) (footnote omitted).

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But § 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031.

Public education is not a "right" granted to individuals by the Constitution. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 35 (1973). But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer* v. *Nebraska*, 262 U. S. 390, 400 (1923). We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," *Abington School District* v. *Schempp*, 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." *Ambach* v. *Norwick*, 441 U. S. 68, 76 (1979). "[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin* v. *Yoder*, 406 U. S. 205, 221 (1972). And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." *Ambach* v. *Norwick*, *supra*, at 77. In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals

of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin* v. *Yoder*, *supra*, at 221. Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[20] What we said 28 years ago in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), still holds true:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school

[20] Because the State does not afford noncitizens the right to vote, and may bar noncitizens from participating in activities at the heart of its political community, appellants argue that denial of a basic education to these children is of less significance than the denial to some other group. Whatever the current status of these children, the courts below concluded that many will remain here permanently and that some indeterminate number will eventually become citizens. The fact that many will not is not decisive, even with respect to the importance of education to participation in core political institutions. "[T]he benefits of education are not reserved to those whose productive utilization of them is a certainty . . . ." 458 F. Supp., at 581, n. 14. In addition, although a noncitizen "may be barred from full involvement in the political arena, he may play a role—perhaps even a leadership role—in other areas of import to the community." *Nyquist* v. *Mauclet*, 432 U. S. 1, 12 (1977). Moreover, the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.

attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.*, at 493.

B

These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. See *San Antonio Independent School Dist.* v. *Rodriguez*, *supra*, at 28–39. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining

the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

IV

It is the State's principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children *vel non* establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents. The State notes that while other aliens are admitted "on an equality of legal privileges with all citizens under non-discriminatory laws," *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 420 (1948), the asserted right of these children to an education can claim no implicit congressional imprimatur.[21] Indeed, in the State's view, Congress' apparent disapproval of the presence of these children within the United States, and the evasion of the federal regulatory program that is the mark of undocumented status, provides authority for its decision to impose upon them special disabilities. Faced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens. But we are unable to find in the congressional immigration scheme any statement of policy that might weigh signifi-

[21] If the constitutional guarantee of equal protection was available only to those upon whom Congress affirmatively granted its benefit, the State's argument would be virtually unanswerable. But the Equal Protection Clause operates of its own force to protect anyone "within [the State's] jurisdiction" from the State's arbitrary action. See Part II, *supra*. The question we examine in text is whether the federal *disapproval* of the presence of these children assists the State in overcoming the presumption that denial of education to innocent children is not a rational response to legitimate state concerns.

cantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education.

The Constitution grants Congress the power to "establish an uniform Rule of Naturalization." Art. I., § 8, cl. 4. Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders. See *Mathews* v. *Diaz*, 426 U. S. 67 (1976); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952). The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field. *Mathews*, *supra*, at 81. But this traditional caution does not persuade us that unusual deference must be shown the classification embodied in § 21.031. The States enjoy no power with respect to the classification of aliens. See *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). This power is "committed to the political branches of the Federal Government." *Mathews*, 426 U. S., at 81. Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status, *id.*, at 85, and to "take into account the character of the relationship between the alien and this country," *id.*, at 80, only rarely are such matters relevant to legislation by a State. See *Id.*, at 84–85; *Nyquist* v. *Mauclet*, 432 U. S. 1, 7, n. 8 (1977).

As we recognized in *De Canas* v. *Bica*, 424 U. S. 351 (1976), the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal. In *De Canas*, the State's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country. *Id.*, at 361. In contrast, there is no indication that the disability imposed by § 21.031 corresponds to any identifiable congressional policy. The

State does not claim that the conservation of state educational resources was ever a congressional concern in restricting immigration. More importantly, the classification reflected in § 21.031 does not operate harmoniously within the federal program.

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. 8 U. S. C. §§ 1251, 1252 (1976 ed. and Supp. IV). But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. See, *e. g.*, 8 U. S. C. §§ 1252, 1253(h), 1254 (1976 ed. and Supp. IV). In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.

We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education. In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education. The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to "*the purposes for which the state desires to use it.*" *Oyama* v. *California*, 332 U. S. 633, 664–665 (1948) (Murphy, J., concurring) (emphasis added). We therefore turn to the state objectives that are said to support § 21.031.

V

Appellants argue that the classification at issue furthers an interest in the "preservation of the state's limited resources for the education of its lawful residents."[22] Brief for Appellants 26. Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. *Graham* v. *Richardson*, 403 U. S. 365, 374–375 (1971). The State must do more than justify its classification with a concise expression of an intention to discriminate. *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 605 (1976). Apart from the asserted state prerogative to act against undocumented children solely on the basis of their undocumented status—an asserted prerogative that carries only minimal force in the circumstances of these cases—we discern three colorable state interests that might support § 21.031.

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[22] Appellant School District sought at oral argument to characterize the alienage classification contained in § 21.031 as simply a test of residence. We are unable to uphold § 21.031 on that basis. Appellants conceded that if, for example, a Virginian or a legally admitted Mexican citizen entered Tyler with his school-age children, intending to remain only six months, those children would be viewed as residents entitled to attend Tyler schools. Tr. of Oral Arg. 31–32. It is thus clear that Tyler's residence argument amounts to nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools. A State may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as nonresident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State. C. Bouvé, Exclusion and Expulsion of Aliens in the United States 340 (1912). Appellants have not shown that the families of undocumented children do not comply with the established standards by which the State historically tests residence. Apart from the alienage limitation, § 21.031(b) requires a school district to provide education only to resident children. The school districts of the State are as free to apply to undocumented children established criteria for determining residence as they are to apply those criteria to any other child who seeks admission.

First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population,[23] § 21.031 hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc. 458 F. Supp., at 578; 501 F. Supp., at 570–571. The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.[24] Thus, even making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that "[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration," at least when compared with the alternative of

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[23] Although the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service. Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns. See *De Canas* v. *Bica*, 424 U. S., at 354–356.

[24] The courts below noted the ineffectiveness of the Texas provision as a means of controlling the influx of illegal entrants into the State. See 628 F. 2d, at 460–461; 458 F. Supp., at 585; 501 F. Supp., at 578 ("The evidence demonstrates that undocumented persons do not immigrate in search for a free public education. Virtually all of the undocumented persons who come into this country seek employment opportunities and not educational benefits. . . . There was overwhelming evidence . . . of the unimportance of public education as a stimulus for immigration") (footnote omitted).

prohibiting the employment of illegal aliens. 458 F. Supp., at 585. See 628 F. 2d, at 461; 501 F. Supp., at 579, and n. 88.

Second, while it is apparent that a State may "not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools," *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969), appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. But the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State.[25] As the District Court in No. 80–1934 noted, the State failed to offer any "credible supporting evidence that a proportionately small diminution of the funds spent on each child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education." 501 F. Supp., at 583. And, after reviewing the State's school financing mechanism, the District Court in No. 80–1538 concluded that barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools. 458 F. Supp., at 577. Of course, even if improvement in the quality of education were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are "basically indistinguishable" from legally resident alien children. *Id.*, at 589; 501 F. Supp., at 583, and n. 104.

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence

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[25] Nor does the record support the claim that the educational resources of the State are so direly limited that some form of "educational *triage*" might be deemed a reasonable (assuming that it were a permissible) response to the State's problems. *Id.*, at 579–581.

within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

VI

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is

Affirmed.

JUSTICE MARSHALL, concurring.

While I join the Court opinion, I do so without in any way retreating from my opinion in *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 70–133 (1973) (dissenting opinion). I continue to believe that an individual's interest in education is fundamental, and that this view is amply supported "by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values."

Id., at 111. Furthermore, I believe that the facts of these cases demonstrate the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *Id.*, at 99. See also *Dandridge* v. *Williams*, 397 U. S. 471, 519–521 (1970) (MARSHALL, J., dissenting). It continues to be my view that a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment.

JUSTICE BLACKMUN, concurring.

I join the opinion and judgment of the Court.

Like JUSTICE POWELL, I believe that the children involved in this litigation "should not be left on the streets uneducated." *Post*, at 238. I write separately, however, because in my view the nature of the interest at stake is crucial to the proper resolution of these cases.

The "fundamental rights" aspect of the Court's equal protection analysis—the now-familiar concept that governmental classifications bearing on certain interests must be closely scrutinized—has been the subject of some controversy. Justice Harlan, for example, warned that "[v]irtually every state statute affects important rights. . . . [T]o extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'superlegislature.'" *Shapiro* v. *Thompson*, 394 U. S. 618, 661 (1969) (dissenting opinion). Others have noted that strict scrutiny under the Equal Protection Clause is unnecessary when classifications infringing enumerated constitutional rights are involved, for "a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications." *San Antonio*

Independent School Dist. v. *Rodriguez*, 411 U. S. 1, 61 (1973) (Stewart, J., concurring). See *Shapiro* v. *Thompson*, 394 U. S., at 659 (Harlan, J., dissenting). Still others have suggested that fundamental rights are not properly a part of equal protection analysis at all, because they are unrelated to any defined principle of equality.[1]

These considerations, combined with doubts about the judiciary's ability to make fine distinctions in assessing the effects of complex social policies, led the Court in *Rodriguez* to articulate a firm rule: fundamental rights are those that "explicitly or implicitly [are] guaranteed by the Constitution." 411 U. S., at 33–34. It therefore squarely rejected the notion that "an ad hoc determination as to the social or economic importance" of a given interest is relevant to the level of scrutiny accorded classifications involving that interest, *id.*, at 32, and made clear that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Id.*, at 33.

I joined JUSTICE POWELL's opinion for the Court in *Rodriguez*, and I continue to believe that it provides the appropriate model for resolving most equal protection disputes. Classifications infringing substantive constitutional rights necessarily will be invalid, if not by force of the Equal Protection Clause, then through operation of other provisions of the Constitution. Conversely, classifications bearing on nonconstitutional interests—even those involving "the most basic economic needs of impoverished human beings," *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970)—generally are not subject to special treatment under the Equal Protection Clause, because they are not distinguishable in any relevant way from other regulations in "the area of economics and social welfare." *Ibid.*

With all this said, however, I believe the Court's experience has demonstrated that the *Rodriguez* formulation does

[1] See, *e. g.*, Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1075–1083 (1979).

not settle every issue of "fundamental rights" arising under the Equal Protection Clause. Only a pedant would insist that there are *no* meaningful distinctions among the multitude of social and political interests regulated by the States, and *Rodriguez* does not stand for quite so absolute a proposition. To the contrary, *Rodriguez* implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis. Thus, the Court's decisions long have accorded strict scrutiny to classifications bearing on the right to vote in state elections, and *Rodriguez* confirmed the "constitutional underpinnings of the right to equal treatment in the voting process." 411 U. S., at 34, n. 74. Yet "the right to vote, *per se*, is not a constitutionally protected right," *id.*, at 35, n. 78. See *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 665 (1966); *Rodriguez*, 411 U. S., at 59, n. 2 (Stewart, J., concurring). Instead, regulation of the electoral process receives unusual scrutiny because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964). See *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972). In other words, the right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen[2] cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status.

It is arguable, of course, that the Court never should have applied fundamental rights doctrine in the fashion outlined above. Justice Harlan, for one, maintained that strict equal protection scrutiny was appropriate only when racial or anal-

[2] I use the term "citizen" advisedly. The right to vote, of course, is a political interest of concern to citizens. The right to an education, in contrast, is a social benefit of relevance to a substantial number of those affected by Texas' statutory scheme, as is discussed below.

ogous classifications were at issue. *Shapiro* v. *Thompson*, 394 U. S., at 658–663 (dissenting opinion). See *Reynolds* v. *Sims*, 377 U. S., at 590–591 (Harlan, J., dissenting). But it is too late to debate that point, and I believe that accepting the principle of the voting cases—the idea that state classifications bearing on certain interests pose the risk of allocating rights in a fashion inherently contrary to any notion of "equality"—dictates the outcome here. As both JUSTICE POWELL and THE CHIEF JUSTICE observe, the Texas scheme inevitably will create "a subclass of illiterate persons," *post*, at 241 (POWELL, J., concurring); see *post*, at 242, 254 (BURGER, C. J., dissenting); where I differ with THE CHIEF JUSTICE is in my conclusion that this makes the statutory scheme unconstitutional as well as unwise.

In my view, when the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes, mentioned above, of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group—through the State's action—will have been converted into a discrete underclass. Other benefits provided by the State, such as housing and public assistance, are of course important; to an individual in immediate need, they may be more desirable than the right to be educated. But classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. Cf. *Rodriguez*, 411 U. S., at 115, n. 74 (MARSHALL, J., dissenting). In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.

This conclusion is fully consistent with *Rodriguez*. The Court there reserved judgment on the constitutionality of a state system that "occasioned an absolute denial of educational opportunities to any of its children," noting that "no charge fairly could be made that the system [at issue in *Rodriguez*] fails to provide each child with an opportunity to acquire . . . basic minimal skills." *Id.*, at 37. And it cautioned that in a case "involv[ing] the most persistent and difficult questions of educational policy, . . . [the] Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." *Id.*, at 42. Thus *Rodriguez* held, and the Court now reaffirms, that "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population." *Ante*, at 223. Similarly, it is undeniable that education is not a "fundamental right" in the sense that it is constitutionally guaranteed. Here, however, the State has undertaken to provide an education to most of the children residing within its borders. And, in contrast to the situation in *Rodriguez*, it does not take an advanced degree to predict the effects of a complete denial of education upon those children targeted by the State's classification. In such circumstances, the voting decisions suggest that the State must offer something more than a rational basis for its classification.[3]

Concededly, it would seem ironic to discuss the social necessity of an education in a case that concerned only undocumented aliens "whose very presence in the state and this country is illegal." *Post*, at 250 (BURGER, C. J., dissenting). But because of the nature of the federal immigration laws and the pre-eminent role of the Federal Government in

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[3] The Court concludes that the provision at issue must be invalidated "unless it furthers some substantial goal of the State." *Ante*, at 224. Since the statute fails to survive this level of scrutiny, as the Court demonstrates, there is no need to determine whether a more probing level of review would be appropriate.

regulating immigration, the class of children here is not a monolithic one. Thus, the District Court in the *Alien Children Education* case found as a factual matter that a significant number of illegal aliens will remain in this country permanently, 501 F. Supp. 544, 558–559 (SD Tex. 1980); that some of the children involved in this litigation are "documentable," *id.*, at 573; and that "[m]any of the undocumented children are not deportable. None of the named plaintiffs is under an order of deportation." *Id.*, at 583, n. 103. As the Court's alienage cases demonstrate, these children may not be denied rights that are granted to citizens, excepting only those rights bearing on political interests. See *Nyquist* v. *Mauclet*, 432 U. S. 1 (1977). And, as JUSTICE POWELL notes, the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported. *Post*, at 240–241, n. 6. Indeed, any attempt to do so would involve the State in the administration of the immigration laws. Whatever the State's power to classify deportable aliens, then—and whatever the Federal Government's ability to draw more precise and more acceptable alienage classifications—the statute at issue here sweeps within it a substantial number of children who will in fact, and who may well be entitled to, remain in the United States. Given the extraordinary nature of the interest involved, this makes the classification here fatally imprecise. And, as the Court demonstrates, the Texas legislation is not otherwise supported by any substantial interests.

Because I believe that the Court's carefully worded analysis recognizes the importance of the equal protection and preemption interests I consider crucial, I join its opinion as well as its judgment.

JUSTICE POWELL, concurring.

I join the opinion of the Court, and write separately to emphasize the unique character of the cases before us.

The classification in question severely disadvantages children who are the victims of a combination of circumstances. Access from Mexico into this country, across our 2,000-mile border, is readily available and virtually uncontrollable. Illegal aliens are attracted by our employment opportunities, and perhaps by other benefits as well. This is a problem of serious national proportions, as the Attorney General recently has recognized. See *ante*, at 218–219, n. 17. Perhaps because of the intractability of the problem, Congress—vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens—has not provided effective leadership in dealing with this problem.[1] It therefore is certain that illegal aliens will continue

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[1] Article I, § 8, cl. 4, of the Constitution provides: "The Congress shall have Power . . . To establish an uniform Rule of Naturalization." The Federal Government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 419 (1948). See *Graham* v. *Richardson*, 403 U. S. 365, 378 (1971) (regulation of aliens is "constitutionally entrusted to the Federal Government"). The Court has traditionally shown great deference to federal authority over immigration and to federal classifications based upon alienage. See, *e. g.*, *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977) ("it is important to underscore the limited scope of judicial inquiry into immigration legislation"); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"). Indeed, even equal protection analysis in this area is based to a large extent on an underlying theme of pre-emption and exclusive federal power over immigration. See *Takahashi* v. *Fish & Game Comm'n*, *supra*, at 420 (the Federal Government has admitted resident aliens to the country "on an equality of legal privileges with all citizens under nondiscriminatory laws" and the States may not alter the terms of this admission). Compare *Graham* v. *Richardson*, *supra*, and *Sugarman* v. *Dougall*, 413 U. S. 634 (1973), with *Mathews* v. *Diaz*, 426 U. S. 67 (1976),

to enter the United States and, as the record makes clear, an unknown percentage of them will remain here. I agree with the Court that their children should not be left on the streets uneducated.

Although the analogy is not perfect, our holding today does find support in decisions of this Court with respect to the status of illegitimates. In *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972), we said: "[V]isiting . . . condemnation on the head of an infant" for the misdeeds of the parents is illogical, unjust, and "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."

In these cases, the State of Texas effectively denies to the school-age children of illegal aliens the opportunity to attend the free public schools that the State makes available to all residents. They are excluded only because of a status resulting from the violation by parents or guardians of our immigration laws and the fact that they remain in our country unlawfully. The appellee children are innocent in this respect. They can "affect neither their parents' conduct nor their own status." *Trimble* v. *Gordon*, 430 U. S. 762, 770 (1977).

Our review in a case such as these is properly heightened.[2] See *id.*, at 767. Cf. *Craig* v. *Boren*, 429 U. S. 190 (1976). The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children thus have been

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and *Hampton* v. *Mow Sun Wong*, 426 U. S. 88 (1976). Given that the States' power to regulate in this area is so limited, and that this is an area of such peculiarly strong federal authority, the necessity of federal leadership seems evident.

[2] I emphasize the Court's conclusion that strict scrutiny is not appropriately applied to this classification. This exacting standard of review has been reserved for instances in which a "fundamental" constitutional right or a "suspect" classification is present. Neither is present in these cases, as the Court holds.

singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the State's interests be substantial and that the means bear a "fair and substantial relation" to these interests.[3] See *Lalli* v. *Lalli*, 439 U. S. 259, 265 (1978) ("classifications based on illegitimacy . . . are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests"); *id.*, at 271 ("[a]s the State's interests are substantial, we now consider the means adopted").

In my view, the State's denial of education to these children bears no substantial relation to any substantial state interest. Both of the District Courts found that an uncertain but significant percentage of illegal alien children will remain in Texas as residents and many eventually will become citizens. The discussion by the Court, *ante*, at Part V, of the State's purported interests demonstrates that they are poorly served by the educational exclusion. Indeed, the interests relied upon by the State would seem to be insubstantial in view of the consequences to the State itself of wholly uneducated persons living indefinitely within its borders. By contrast, access to the public schools is made available to the children of lawful residents without regard to the tempo-

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[3] THE CHIEF JUSTICE argues in his dissenting opinion that this heightened standard of review is inconsistent with the Court's decision in *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973). But in *Rodriguez* no group of children was singled out by the State and then penalized because of their parents' status. Rather, funding for education varied across the State because of the tradition of local control. Nor, in that case, was any group of children totally deprived of all education as in these cases. If the resident children of illegal aliens were denied welfare assistance, made available by government to all other children who qualify, this also—in my opinion—would be an impermissible penalizing of children because of their parents' status.

rary nature of their residency in the particular Texas school district.[4] The Court of Appeals and the District Courts that addressed these cases concluded that the classification could not satisfy even the bare requirements of rationality. One need not go so far to conclude that the exclusion of appellees' class[5] of children from state-provided education is a type of punitive discrimination based on status that is impermissible under the Equal Protection Clause.

In reaching this conclusion, I am not unmindful of what must be the exasperation of responsible citizens and government authorities in Texas and other States similarly situated. Their responsibility, if any, for the influx of aliens is slight compared to that imposed by the Constitution on the Federal Government.[6] So long as the ease of entry remains inviting,

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[4] The State provides free public education to all lawful residents whether they intend to reside permanently in the State or only reside in the State temporarily. See *ante*, at 227, n. 22. Of course a school district may require that illegal alien children, like any other children, actually reside in the school district before admitting them to the schools. A requirement of *de facto* residency, uniformly applied, would not violate any principle of equal protection.

[5] The classes certified in these cases included all undocumented school-age children of Mexican origin residing in the school district, see *ante*, at 206, or the State. See *In re Alien Children Education Litigation*, 501 F. Supp. 544, 553 (SD Tex. 1980). Even so, it is clear that neither class was thought to include mature Mexican minors who were solely responsible for violating the immigration laws. In 458 F. Supp. 569 (ED Tex. 1978), the court characterized plaintiffs as "entire families who have migrated illegally." *Id.*, at 578. Each of the plaintiff children in that case was represented by a parent or guardian. Similarly the court in *In re Alien Children Education Litigation* found that "[u]ndocumented children do not enter the United States unaccompanied by their parents." 501 F. Supp., at 573. A different case would be presented in the unlikely event that a minor, old enough to be responsible for illegal entry and yet still of school age, entered this country illegally on his own volition.

[6] In addition, the States' ability to respond on their own to the problems caused by this migration may be limited by the principles of pre-emption that apply in this area. See, *e. g.*, *Hines* v. *Davidowitz*, 312 U. S. 52

and the power to deport is exercised infrequently by the Federal Government, the additional expense of admitting these children to public schools might fairly be shared by the Federal and State Governments. But it hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons many of whom will remain in the State, adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime.

(1941). In *De Canas* v. *Bica*, 424 U. S. 351 (1976), the Court found that a state law making it a criminal offense to employ illegal aliens was not preempted by federal authority over aliens and immigration. The Court found evidence that Congress intended state regulation in this area. *Id.*, at 361 ("there is evidence . . . that Congress intends that States may, to the extent consistent with federal law, regulate the employment of illegal aliens"). Moreover, under federal immigration law, only immigrant aliens and nonimmigrant aliens with special permission are entitled to work. See 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure, §§ 1.34a, 1.36, 2.6b (1981). Because federal law clearly indicates that only certain specified aliens may lawfully work in the country and because these aliens have documentation establishing this right, the State in *De Canas* was able to identify with certainty which aliens had a federal permission to work in this country. The State did not need to concern itself with an alien's current or future deportability. By contrast, there is no comparable federal guidance in the area of education. No federal law invites state regulation; no federal regulations identify those aliens who have a right to attend public schools. In addition, the Texas educational exclusion requires the State to make predictions as to whether individual aliens eventually will be found to be deportable. But it is impossible for a State to determine which aliens the Federal Government will eventually deport, which the Federal Government will permit to stay, and which the Federal Government will ultimately naturalize. Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country, perhaps even as a citizen. Indeed, even the Immigration and Naturalization Service cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course. See, *e. g.*, 8 U. S. C. §§ 1252, 1253(h), 1254 (1976 ed. and Supp. IV).

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language.[1] However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense." See *TVA* v. *Hill*, 437 U. S. 153, 194–195 (1978). We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

The Court makes no attempt to disguise that it is acting to make up for Congress' lack of "effective leadership" in dealing with the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders.[2]

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[1] It does not follow, however, that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here. Surely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation.

[2] The Department of Justice recently estimated the number of illegal aliens within the United States at between 3 and 6 million. Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 7 (1981) (testimony of Attorney General Smith). Other estimates run as high as 12 million. See Strout, Closing the Door on Immigration, Christian Science Monitor, May 21, 1982, p. 22, col. 4.

See *ante*, at 237–238 (POWELL, J., concurring). The failure of enforcement of the immigration laws over more than a decade and the inherent difficulty and expense of sealing our vast borders have combined to create a grave socioeconomic dilemma. It is a dilemma that has not yet even been fully assessed, let alone addressed. However, it is not the function of the Judiciary to provide "effective leadership" simply because the political branches of government fail to do so.

The Court's holding today manifests the justly criticized judicial tendency to attempt speedy and wholesale formulation of "remedies" for the failures—or simply the laggard pace—of the political processes of our system of government. The Court employs, and in my view abuses, the Fourteenth Amendment in an effort to become an omnipotent and omniscient problem solver. That the motives for doing so are noble and compassionate does not alter the fact that the Court distorts our constitutional function to make amends for the defaults of others.

I

In a sense, the Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases. Yet the extent to which the Court departs from principled constitutional adjudication is nonetheless disturbing.

I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment *applies* to aliens who, after their illegal entry into this country, are indeed physically "within the jurisdiction" of a state. However, as the Court concedes, this "only begins the inquiry." *Ante*, at 215. The Equal Protection Clause does not mandate identical treatment of different categories of persons. *Jefferson* v. *Hackney*, 406 U. S. 535, 549 (1972); *Reed* v. *Reed*, 404 U. S. 71, 75 (1971); *Tigner* v. *Texas*, 310 U. S. 141, 147–148 (1940).

The dispositive issue in these cases, simply put, is whether, for purposes of allocating its finite resources, a state has a legitimate reason to differentiate between persons

who are lawfully within the state and those who are unlawfully there. The distinction the State of Texas has drawn—based not only upon its own legitimate interests but on classifications established by the Federal Government in its immigration laws and policies—is not unconstitutional.

A

The Court acknowledges that, except in those cases when state classifications disadvantage a "suspect class" or impinge upon a "fundamental right," the Equal Protection Clause permits a state "substantial latitude" in distinguishing between different groups of persons. *Ante*, at 216–217. Moreover, the Court expressly—and correctly—rejects any suggestion that illegal aliens are a suspect class, *ante*, at 219, n. 19, or that education is a fundamental right, *ante*, at 221, 223. Yet by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.

In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public education, see *ante*, at 223–224.[3] If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.

(1)

The Court first suggests that these illegal alien children, although not a suspect class, are entitled to special solicitude under the Equal Protection Clause because they lack "control" over or "responsibility" for their unlawful entry into this country. *Ante*, at 220, 223–224. Similarly, the Court appears to take the position that § 21.031 is presumptively "irrational" because it has the effect of imposing "penalties"

[3] The Court implies, for example, that the Fourteenth Amendment would not require a state to provide welfare benefits to illegal aliens.

on "innocent" children. *Ibid.* See also *ante*, at 238–239 (POWELL, J., concurring).[4] However, the Equal Protection Clause does not preclude legislators from classifying among persons on the basis of factors and characteristics over which individuals may be said to lack "control." Indeed, in some circumstances persons generally, and children in particular, may have little control over or responsibility for such things as their ill health, need for public assistance, or place of residence. Yet a state legislature is not barred from considering, for example, relevant differences between the mentally healthy and the mentally ill, or between the residents of different counties,[5] simply because these may be factors unrelated to individual choice or to any "wrongdoing." The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility; it is not an all-encompassing "equalizer" designed to eradicate every distinction for which persons are not "responsible."

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[4] Both the opinion of the Court and JUSTICE POWELL's concurrence imply that appellees are being "penalized" because their *parents* are illegal entrants. *Ante*, at 220; *ante*, at 238–239, and 239, n. 3 (POWELL, J., concurring). However, Texas has classified appellees on the basis of *their own* illegal status, not that of their parents. Children born in this country to illegal alien parents, including some of appellees' siblings, are not excluded from the Texas schools. Nor does Texas discriminate against appellees because of their Mexican origin or citizenship. Texas provides a free public education to countless thousands of Mexican immigrants who are lawfully in this country.

[5] Appellees "lack control" over their illegal residence in this country in the same sense as lawfully resident children lack control over the school district in which their parents reside. Yet in *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973), we declined to review under "heightened scrutiny" a claim that a State discriminated against residents of less wealthy school districts in its provision of educational benefits. There was no suggestion in that case that a child's "lack of responsibility" for his residence in a particular school district had any relevance to the proper standard of review of his claims. The result was that children lawfully here but residing in different counties received different treatment.

The Court does not presume to suggest that appellees' purported lack of culpability for their illegal status prevents them from being deported or otherwise "penalized" under federal law. Yet would deportation be any less a "penalty" than denial of privileges provided to legal residents?[6] Illegality of presence in the United States does not—and need not—depend on some amorphous concept of "guilt" or "innocence" concerning an alien's entry. Similarly, a state's use of federal immigration status as a basis for legislative classification is not necessarily rendered suspect for its failure to take such factors into account.

The Court's analogy to cases involving discrimination against illegitimate children—see *ante*, at 220; *ante*, at 238–239 (POWELL, J., concurring)—is grossly misleading. The State has not thrust any disabilities upon appellees due to their "status of birth." Cf. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 176 (1972). Rather, appellees' status is predicated upon the circumstances of their concededly illegal presence in this country, and is a direct result of Congress' obviously valid exercise of its "broad constitutional powers" in the field of immigration and naturalization. U. S. Const., Art. I, § 8, cl. 4; see *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 419 (1948). This Court has recognized that in allocating governmental benefits to a given class of aliens, one "may take into account the character of the relationship between the alien and this country." *Mathews* v. *Diaz*, 426 U. S. 67, 80 (1976). When that "relationship" is a federally prohibited one, there can, of course, be no presumption that a state has a constitutional duty to include illegal aliens among the recipients of its governmental benefits.[7]

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[6] Indeed, even children of illegal alien parents born in the United States can be said to be "penalized" when their parents are deported.

[7] It is true that the Constitution imposes lesser constraints on the Federal Government than on the states with regard to discrimination against *lawfully* admitted aliens. *E. g.*, *Mathews* v. *Diaz*, 426 U. S. 67 (1976); *Hampton* v. *Mow Sun Wong*, 426 U. S. 88 (1976). This is because "Congress and the President have broad power over immigration and natural-

(2)

The second strand of the Court's analysis rests on the premise that, although public education is not a constitutionally guaranteed right, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Ante*, at 221. Whatever meaning or relevance this opaque observation might have in some other context,[8] it simply has no bearing on the issues at hand. Indeed, it is never made clear what the Court's opinion means on this score.

The importance of education is beyond dispute. Yet we have held repeatedly that the importance of a governmental service does not elevate it to the status of a "fundamental right" for purposes of equal protection analysis. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 30–31 (1973); *Lindsey* v. *Normet*, 405 U. S. 56, 73–74 (1972). In *San Antonio Independent School Dist.*, *supra*, JUSTICE POWELL, speaking for the Court, expressly rejected the proposition that state laws dealing with public education are subject to special scrutiny under the Equal Protection Clause. Moreover, the Court points to no meaningful way to distinguish between education and other governmental bene-

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ization which the States do not possess," *Hampton*, *supra*, at 95, and because state discrimination against legally resident aliens conflicts with and alters "the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states." *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 419 (1948). However, the same cannot be said when Congress has decreed that certain aliens should not be admitted to the United States at all.

[8] In support of this conclusion, the Court's opinion strings together quotations drawn from cases addressing such diverse matters as the right of individuals under the Due Process Clause to learn a foreign language, *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); the First Amendment prohibition against state-mandated religious exercises in the public schools, *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); and state impingements upon the free exercise of religion, *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). However, not every isolated utterance of this Court retains force when wrested from the context in which it was made.

fits in this context. Is the Court suggesting that education is more "fundamental" than food, shelter, or medical care?

The Equal Protection Clause guarantees similar treatment of similarly situated persons, but it does not mandate a constitutional hierarchy of governmental services. JUSTICE POWELL, speaking for the Court in *San Antonio Independent School Dist.*, *supra*, at 31, put it well in stating that to the extent this Court raises or lowers the degree of "judicial scrutiny" in equal protection cases according to a transient Court majority's view of the societal importance of the interest affected, we "assum[e] a legislative role and one for which the Court lacks both authority and competence." Yet that is precisely what the Court does today. See also *Shapiro* v. *Thompson*, 394 U. S. 618, 655–661 (1969) (Harlan, J., dissenting).

The central question in these cases, as in every equal protection case not involving truly fundamental rights "explicitly or implicitly guaranteed by the Constitution," *San Antonio Independent School Dist.*, *supra*, at 33–34, is whether there is some legitimate basis for a legislative distinction between different classes of persons. The fact that the distinction is drawn in legislation affecting access to public education—as opposed to legislation allocating other important governmental benefits, such as public assistance, health care, or housing—cannot make a difference in the level of scrutiny applied.

B

Once it is conceded—as the Court does—that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose. *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979); *Dandridge* v. *Williams*, 397 U. S. 471, 485–487 (1970); see *ante*, at 216.[9]

[9]This "rational basis standard" was applied by the Court of Appeals. 628 F. 2d 448, 458–461 (1980).

The State contends primarily that § 21.031 serves to prevent undue depletion of its limited revenues available for education, and to preserve the fiscal integrity of the State's school-financing system against an ever-increasing flood of illegal aliens—aliens over whose entry or continued presence it has no control. Of course such fiscal concerns alone could not justify discrimination against a suspect class or an arbitrary and irrational denial of benefits to a particular group of persons. Yet I assume no Member of this Court would argue that prudent conservation of finite state revenues is *per se* an illegitimate goal. Indeed, the numerous classifications this Court has sustained in social welfare legislation were invariably related to the limited amount of revenues available to spend on any given program or set of programs. See, *e. g.*, *Jefferson* v. *Hackney*, 406 U. S., at 549–551; *Dandridge* v. *Williams*, *supra*, at 487. The significant question here is whether the requirement of tuition from illegal aliens who attend the public schools—as well as from residents of other states, for example—is a rational and reasonable means of furthering the State's legitimate fiscal ends.[10]

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[10] The Texas law might also be justified as a means of deterring unlawful immigration. While regulation of immigration is an exclusively federal function, a state may take steps, consistent with federal immigration policy, to protect its economy and ability to provide governmental services from the "deleterious effects" of a massive influx of illegal immigrants. *De Canas* v. *Bica*, 424 U. S. 351 (1976); *ante*, at 228, n. 23. The Court maintains that denying illegal aliens a free public education is an "ineffectual" means of deterring unlawful immigration, at least when compared to a prohibition against the employment of illegal aliens. *Ante*, at 228–229. Perhaps that is correct, but it is not dispositive; the Equal Protection Clause does not mandate that a state choose either the most effective and all-encompassing means of addressing a problem or none at all. *Dandridge* v. *Williams*, 397 U. S. 471, 486–487 (1970). Texas might rationally conclude that more significant "demographic or economic problem[s]," *ante*, at 228, are engendered by the illegal entry into the State of entire families of aliens for indefinite periods than by the periodic sojourns of single adults who intend to leave the State after short-term or seasonal employment. It blinks reality to maintain that the availability of governmental services such as education plays no role in an alien family's decision to enter, or re-

Without laboring what will undoubtedly seem obvious to many, it simply is not "irrational" for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present. By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state.[11] In *De Canas* v. *Bica*, 424 U. S. 351, 357 (1976), we held that a State may protect its "fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens." And only recently this Court made clear that a State has a legitimate interest in protecting and preserving the quality of its schools and "the right of its own *bona fide residents* to attend such institutions on a preferential tuition basis." *Vlandis* v. *Kline*, 412 U. S. 441, 453 (1973) (emphasis added). See also *Elkins* v. *Moreno*, 435 U. S. 647, 663–668 (1978). The Court has failed to offer even a plausible explanation why illegality of residence

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main in, this country; certainly, the availability of a free bilingual public education might well influence an alien to bring his children rather than travel alone for better job opportunities.

[11] The Court suggests that the State's classification is improper because "[a]n illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen." *Ante*, at 226. However, once an illegal alien is given federal permission to remain, he is no longer subject to exclusion from the tuition-free public schools under § 21.031. The Court acknowledges that the Tyler Independent School District provides a free public education to any alien who has obtained, *or is in the process of obtaining*, documentation from the United States Immigration and Naturalization Service. See *ante*, at 206, n. 2. Thus, Texas has not taken it upon itself to determine which aliens are or are not entitled to United States residence. JUSTICE BLACKMUN's assertion that the Texas statute will be applied to aliens "who may well be entitled to . . . remain in the United States," *ante*, at 236 (concurring opinion), is wholly without foundation.

in this country is not a factor that may legitimately bear upon the bona fides of state residence and entitlement to the benefits of lawful residence.[12]

It is significant that the Federal Government has seen fit to exclude illegal aliens from numerous social welfare programs, such as the food stamp program, 7 U. S. C. § 2015(f) (1976 ed. and Supp. IV) and 7 CFR § 273.4 (1981), the old-age assistance, aid to families with dependent children, aid to the blind, aid to the permanently and totally disabled, and supplemental security income programs, 45 CFR § 233.50 (1981), the Medicare hospital insurance benefits program, 42 U. S. C. § 1395i–2 and 42 CFR § 405.205(b) (1981), and the Medicaid hospital insurance benefits for the aged and disabled program, 42 U. S. C. § 1395*o* and 42 CFR § 405.103 (a)(4) (1981). Although these exclusions do not conclusively demonstrate the constitutionality of the State's use of the same classification for comparable purposes, at the very least they tend to support the rationality of excluding illegal alien residents of a state from such programs so as to preserve the state's finite revenues for the benefit of lawful residents. See *Mathews* v. *Diaz*, 426 U. S, at 80; see also n. 7, *supra*.

The Court maintains—as if this were the issue—that "barring undocumented children from local schools would not necessarily improve the quality of education provided in those

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[12] The Court's opinion is disingenuous when it suggests that the State has merely picked a "disfavored group" and arbitrarily defined its members as nonresidents. *Ante*, at 227, n. 22. Appellees' "disfavored status" stems from the very fact that federal law explicitly prohibits them from being in this country. Moreover, the analogies to Virginians or legally admitted Mexican citizens entering Texas, *ibid.*, are spurious. A Virginian's right to migrate to Texas, without penalty, is protected by the Constitution, see, *e. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); and a lawfully admitted alien's right to enter the State is likewise protected by federal law. See *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410 (1948). Cf. *Zobel* v. *Williams*, *ante*, p. 55.

schools." *Ante*, at 229. See 458 F. Supp. 569, 577 (ED Tex. 1978).[13] However, the legitimacy of barring illegal aliens from programs such as Medicare or Medicaid does not depend on a showing that the barrier would "improve the quality" of medical care given to persons lawfully entitled to participate in such programs. Modern education, like medical care, is enormously expensive, and there can be no doubt that very large added costs will fall on the State or its local school districts as a result of the inclusion of illegal aliens in the tuition-free public schools. The State may, in its discretion, use any savings resulting from its tuition requirement to "improve the quality of education" in the public school system, or to enhance the funds available for other social programs, or to reduce the tax burden placed on its residents; each of these ends is "legitimate." The State need not show, as the Court implies, that the incremental cost of educating illegal aliens will send it into bankruptcy, or have a "'grave impact on the quality of education,'" *ante*, at 229; that is not dispositive under a "rational basis" scrutiny. In the absence of a constitutional imperative to provide for the education of illegal aliens, the State may "rationally" choose to take advantage of whatever savings will accrue from limiting access to the tuition-free public schools to its own lawful residents, excluding even citizens of neighboring States.[14]

Denying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public schools may well outweigh the costs of educating them. But that is not the issue; the fact

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[13] The District Court so concluded primarily because the State would decrease its funding to local school districts in proportion to the exclusion of illegal alien children. 458 F. Supp., at 577.

[14] I assume no Member of the Court would challenge Texas' right to charge tuition to students residing across the border in Louisiana who seek to attend the nearest school in Texas.

that there are sound *policy* arguments against the Texas Legislature's choice does not render that choice an unconstitutional one.

II

The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem. *Lindsey* v. *Normet*, 405 U. S., at 74. See *Reynolds* v. *Sims*, 377 U. S. 533, 624–625 (1964) (Harlan, J., dissenting). Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy. Today's cases, I regret to say, present yet another example of unwarranted judicial action which in the long run tends to contribute to the weakening of our political processes.[15]

Congress, "vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens," *ante*, at 237 (POWELL, J., concurring), bears primary responsibility for addressing the problems occasioned by the millions of illegal aliens flooding across our southern border. Similarly, it is for Congress, and not this Court, to

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[15] Professor Bickel noted that judicial review can have a "tendency over time seriously to weaken the democratic process." A. Bickel, The Least Dangerous Branch 21 (1962). He reiterated James Bradley Thayer's observation that

"'the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.'" *Id.*, at 22 (quoting J. Thayer, John Marshall 106–107 (1901)).

assess the "social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Ante*, at 221; see *ante*, at 223–224. While the "specter of a permanent caste" of illegal Mexican residents of the United States is indeed a disturbing one, see *ante*, at 218–219, it is but one segment of a larger problem, which is for the political branches to solve. I find it difficult to believe that Congress would long tolerate such a self-destructive result—that it would fail to deport these illegal alien families or to provide for the education of their children. Yet instead of allowing the political processes to run their course—albeit with some delay—the Court seeks to do Congress' job for it, compensating for congressional inaction. It is not unreasonable to think that this encourages the political branches to pass their problems to the Judiciary.

The solution to this seemingly intractable problem is to defer to the political processes, unpalatable as that may be to some.

HATHORN ET AL. *v.* LOVORN ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 81–451. Argued April 27, 1982—Decided June 15, 1982

A 1964 Mississippi statute provides that boards of trustees of municipal separate school districts in the State shall consist of five members, and that in any county in which a district embraces the entire county "in which Highways 14 and 15 intersect," one trustee shall be elected from each supervisors district. The Louisville School District is coextensive with Winston County, Miss., which is the only county in which Highways 14 and 15 intersect. Since 1960, the Louisville mayor and city aldermen appointed three of the five members of the District's Board of Trustees, and Winston County voters residing outside Louisville elected the other two members. The county officials never implemented the 1964 statute. Respondent Winston County voters filed an action against petitioner local officials in Mississippi Chancery Court seeking to enforce the 1964 statute. The court dismissed the complaint on the ground that the statute violated the state constitutional bar against local legislation. The Mississippi Supreme Court reversed and remanded, striking only the statute's reference to Highways 14 and 15 and upholding the remainder of the statute. The Supreme Court without comment denied petitioners' petition for rehearing in which they argued for the first time that the Chancery Court could not implement the reformed statute until the change had been precleared under § 5 of the Voting Rights Act of 1965. On remand, the Chancery Court ordered an election pursuant to the redacted statute under procedures prescribed by the court, but directed petitioners to submit the election plan to the United States Attorney General for preclearance under § 5 of the Voting Rights Act. The Attorney General subsequently objected to the plan, and the Chancery Court ultimately concluded that its order would remain in force subject to compliance with the Voting Rights Act. Respondents once again appealed to the Supreme Court, which held that its prior decision was the law of the case and that the Chancery Court improperly conditioned the election on compliance with the Voting Rights Act.

Held:

1. The Mississippi Supreme Court's decision did not rest on independent and adequate state grounds so as to bar this Court's review of the federal issue. Where the state court's first decision did not appear final when rendered, the court's subsequent reliance on the law of the case

does not prevent this Court from reviewing federal questions determined in the first appeal. Nor does the fact that petitioners' reliance upon the Voting Rights Act issue for the first time in their petition for rehearing may have been untimely under a Mississippi procedural rule constitute an independent and adequate state ground barring this Court's review of the federal question, where it appears that, if Mississippi still follows such a rule, it does not do so "strictly or regularly." Pp. 261–265.

2. The Mississippi courts had the power to decide whether § 5 of the Voting Rights Act applied to the change in election procedures sought by respondents, and must withhold further implementation of the disputed change until the parties demonstrate compliance with § 5. Both the language and purposes of the Act refute the notion that a state court asked to implement a change in the State's voting laws cannot inquire whether the change is subject to § 5 but must ignore that circumstance and enter a decree violating federal law. Section 14(b) of the Act, which provides that no court other than the District Court for the District of Columbia shall have jurisdiction to enter a declaratory judgment pursuant to § 5 governs only declaratory judgments approving proposed voting procedure changes. And nothing in the provisions of § 5, requiring an action under that section to be heard by a three-judge federal district court, or in the provisions of § 12(f) of the Act, giving federal district courts jurisdiction of proceedings under that section, negates the presumption that, at least when the issue arises collaterally, state courts have the power to decide whether a proposed change in election procedures requires preclearance under § 5. Granting state courts such power helps to insure compliance with the preclearance scheme. Pp. 265–271.

399 So. 2d 1356, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., concurred in the judgment. REHNQUIST, J., filed a dissenting opinion, *post*, p. 271.

James C. Mayo argued the cause and filed a brief for petitioners.

Laurel G. Weir argued the cause and filed a brief for respondents.

Assistant Attorney General Reynolds argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Deputy Solicitor General Wallace*, *Barbara E. Etkind*, *Brian K. Landsberg*, and *Joan A. Magagna*.

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to decide whether a state court may order implementation of a change in election procedure over objections that the change is subject to preclearance under § 5 of the Voting Rights Act of 1965.[1]

I

Since 1960, the Louisville School District has been coextensive with Winston County, Miss. Until last December, the Louisville mayor and city aldermen appointed three of the five members of the District's Board of Trustees, and Winston County voters residing outside Louisville elected the other two members.

In 1964, the Mississippi Legislature enacted a statute providing in part:

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[1] Section 5 provides in relevant part:

"Whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. . . ." 79 Stat. 439, as amended, 42 U. S. C. § 1973c.

Section 4 of the Act, 79 Stat. 438, as amended, 42 U. S. C. § 1973b, defines covered jurisdictions.

> "The boards of trustees of all municipal separate school districts, either with or without added territory, shall consist of five (5) members, each to be chosen for a term of five (5) years, but so chosen that the term of office of one (1) member shall expire each year. . . . [I]n any county in which a municipal separate school district embraces the entire county in which Highways 14 and 15 intersect, one (1) trustee shall be elected from each supervisors district." 1964 Miss. Gen. Laws, ch. 391, p. 563, codified, as amended, in Miss. Code Ann. § 37–7–203(1) (Supp. 1981).

Winston County is the only Mississippi county in which Highways 14 and 15 intersect. Officials in that county never implemented § 37–7–203(1) because they believed the statute's reference to Highways 14 and 15 violated a state constitutional prohibition against local, private, or special legislation.[2]

In 1975, five Winston County voters filed an action in the Chancery Court of Winston County,[3] seeking to enforce the neglected 1964 state statute.[4] These plaintiffs, respondents here, named numerous Louisville and Winston County officials as defendants. The Chancery Court dismissed respond-

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[2] Mississippi Const., Art. 4, § 90, provides:

"The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.:

. . . . . .

"(p) Providing for the management or support of any private or common school, incorporating the same, or granting such school any privileges."

[3] The voters initially filed their suit in the United States District Court for the Northern District of Mississippi. That court stayed federal proceedings to give the Mississippi courts an opportunity to construe the state statute at issue. Record 320. In 1979, pursuant to a notice of voluntary dismissal by stipulation, the court dismissed the federal action without prejudice. *Id.*, at 323.

[4] The voters also charged that the electoral system then in force violated the constitutional principle of one person/one vote. This issue is not before us.

ents' complaint, holding that the statute violated Mississippi's constitutional bar against local legislation. The Mississippi Supreme Court reversed, striking only the specific reference to Highways 14 and 15 and upholding the remaining requirement that, "in any county in which a municipal separate school district embraces the entire county," each supervisors district must elect one trustee. *Lovorn* v. *Hathorn*, 365 So. 2d 947 (1979) (en banc). The court then "remanded to the chancery court for further proceedings not inconsistent with [its] opinion." *Id.*, at 952.

The local officials, petitioners here, filed a petition for rehearing, in which they argued for the first time that the Chancery Court could not implement the reformed statute until the change had been precleared under § 5 of the Voting Rights Act. The Mississippi Supreme Court denied the petition without comment, and this Court denied a petition for a writ of certiorari. *Hathorn* v. *Lovorn*, 441 U. S. 946 (1979).

On remand, the Chancery Court ordered an election pursuant to the redacted statute. The court set out detailed procedures governing the election, including the requirement that "[i]f no candidate receives a majority of the vote cast at any of said elections . . . , a runoff election shall be held . . . between the two candidates receiving the highest vote [in the first election]." Record 143. The court derived the latter requirement from Miss. Code Ann. § 37–7–217 (Supp. 1981), which mandates runoffs in elections conducted under § 37–7–203(1). See Miss. Code Ann. § 37–7–209 (Supp. 1981). The Chancery Court also agreed with petitioners' claim that the changes in election procedure fell within § 5 of the Voting Rights Act, and directed petitioners to submit the election plan to the United States Attorney General for preclearance. Record 141, 146–147.[5]

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[5] As we have explained on numerous occasions, covered jurisdictions may satisfy § 5 by submitting proposed changes to the Attorney General. If the Attorney General objects to the proposal, the jurisdiction may either request reconsideration or seek a declaratory judgment from the United

Upon review of petitioners' submission, the Attorney General objected to the proposed change in election procedure "insofar as it incorporate[d] a majority vote requirement." App. to Pet. for Cert. A–8. Because of the substantial black population in Winston County,[6] an apparent pattern of racially polarized voting in the county, and the historical absence of blacks from various local governing boards, the Attorney General concluded that the runoff procedure could have a discriminatory effect. *Ibid.*[7]

Respondents attempted to overcome this obstacle by both joining the Attorney General as a defendant and persuading the Chancery Court to hold the election without the runoff procedure. The court, however, refused to join the Attorney General and held that state law unambiguously required runoff elections. Buffeted by apparently conflicting state and federal statutes, the Chancery Court concluded that its decree calling for an election would "remain in force subject to compliance with the Federal Voters Rights Act *[sic]* as previously ordered by this Court." Record 342.

Failing to obtain an election from the Chancery Court, respondents once again appealed to the Mississippi Supreme Court. That court observed that its "prior decision, which the United States Supreme Court declined to reverse or alter in any respect, became and is the law of the case." *Carter* v. *Luke*, 399 So. 2d 1356, 1358 (1981). The court explained that because the prior decision upheld a statute referring to the statute requiring runoffs, and because both parties had

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States District Court for the District of Columbia. A covered jurisdiction, of course, also may seek a declaratory judgment in the first instance, omitting submission to the Attorney General. See generally *Blanding* v. *DuBose*, 454 U. S. 393 (1982); *Allen* v. *State Board of Elections*, 393 U. S. 544, 548–550 (1969).

[6] At that time, the Attorney General noted, blacks constituted approximately 39% of the Winston County population but were not a majority in any of the districts from which trustees were to be elected.

[7] The Attorney General also observed that the Louisville School District appears to be the only countywide district in which Mississippi requires runoff elections.

agreed during oral argument to abide by the runoff procedure, the Chancery Court properly enforced the law requiring runoffs and improperly conditioned the election on compliance with the Voting Rights Act. Accordingly, the Mississippi Supreme Court reversed the portion of the Chancery Court's decree referring to the Voting Rights Act and "remanded with directions for the lower court to call and require the holding of an election." *Ibid.* We granted certiorari to decide whether the Mississippi Supreme Court properly ordered the election without insuring compliance with federal law. 454 U. S. 1122 (1981).[8]

II

Before addressing the federal question raised by the Mississippi Supreme Court's decision, we must consider respondents' assertion that the lower court decision rests upon two adequate and independent state grounds. First, respondents contend that the state court's reliance upon the law of the case bars review of the federal question. It has long been established, however, that "[w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . . and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case . . . ." *Reece* v. *Georgia*, 350 U. S. 85, 87 (1955). See also *Davis* v. *O'Hara*, 266 U. S. 314, 321 (1924); *United*

[8] Shortly before petitioners filed their petition for certiorari, the Chancery Court set an election for December 5, 1981. That court, the Mississippi Supreme Court, and this Court denied motions to stay the election. See 454 U. S. 1070 (1981). On December 1, the United States filed suit in the United States District Court for the Northern District of Mississippi, seeking to enjoin implementation of the voting change involved in this case. The District Court refused to issue a temporary restraining order and has not taken any other action.

The December 5 election was held as scheduled. Although the record does not reflect the results of the election, the United States has informed us that a runoff election was held. Brief for United States as *Amicus Curiae* 10, n. 12.

States v. *Denver & Rio Grande R. Co.*, 191 U. S. 84, 93 (1903). Because we cannot review a state court judgment until it is final,[9] a contrary rule would insulate interlocutory state court rulings on important federal questions from our consideration.

In this case the Mississippi Supreme Court's first decision plainly did not appear final at the time it was rendered. The court's remand "for further proceedings not inconsistent with [its] opinion," 365 So. 2d, at 952 (en banc), together with its failure to address expressly the Voting Rights Act issue, suggested that the Chancery Court could still consider the federal issue on remand. Indeed, the Chancery Court interpreted its mandate in precisely this manner.[10] Under these circumstances, the Mississippi Supreme Court's subsequent reliance on the law of the case cannot prevent us from reviewing federal questions determined in the first appeal.[11]

Respondents also argue that the Mississippi Supreme Court pretermitted consideration of the Voting Rights Act because petitioners' reliance upon the issue in a petition for rehearing was untimely. We have recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question.[12] Our decisions, however, stress that a

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[9] 28 U. S. C. § 1257; *O'Dell* v. *Espinoza*, 456 U. S. 430 (1982); *Market Street R. Co.* v. *Railroad Comm'n of California*, 324 U. S. 548, 551 (1945).

[10] The Chancellor, in fact, noted that it "would have been impossible to have submitted to the Attorney General for approval until this Court had set up the mechanics of the election, for until that was done, the Attorney General would not have the data necessary to either approve or disapprove." Record 90–91.

[11] Nor, of course, does our previous denial of petitioners' petition for a writ of certiorari preclude us from examining questions decided during the first state appeal. It is "well-settled . . . that denial of certiorari imparts no implication or inference concerning the Court's view of the merits." *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U. S. 363, 366, n. 1 (1973).

[12] *E. g.*, *Michigan* v. *Tyler*, 436 U. S. 499, 512, n. 7 (1978); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 264, n. 4 (1964).

state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims. Even if we construe the Mississippi Supreme Court's denial of petitioners' petition for rehearing as the silent application of a procedural bar, we cannot conclude that the state court consistently relies upon this rule.

Respondents cite two cases indicating that the Mississippi Supreme Court will consider an issue raised for the first time in a petition for rehearing "[o]nly in exceptional cases." *New & Hughes Drilling Co.* v. *Smith*, 219 So. 2d 657, 661 (Miss. 1969); *Rigdon* v. *General Box Co.*, 249 Miss. 239, 246, 162 So. 2d 863, 864 (1964). Although these opinions may summarize the court's practice prior to 1969, we have been unable to find any more recent decisions repeating or applying the rule.[13] On the contrary, the Mississippi Supreme Court now regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions.[14]

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[13] In *New & Hughes Drilling Co.* itself, the Mississippi Supreme Court permitted an exception to the alleged rule barring review of questions raised for the first time on rehearing. A case decided the same year as *New & Hughes Drilling Co.* is the most recent decision we have found that might have actually applied the procedural rule described by respondents. See *Leake County Cooperative* v. *Dependents of Barrett*, 226 So. 2d 608, 614–616 (Miss. 1969). Even that decision, however, may have rested upon a special rule involving waiver of defects in venue.

Neither the Mississippi Code nor the Rules of the Supreme Court of Mississippi embody the alleged prohibition against presentation of new issues in petitions for rehearing. Under these circumstances, it is difficult to know whether the Mississippi Supreme Court still adheres to the rule, applying it silently, or whether the court has abandoned the rule.

[14] See, *e. g.*, *Cortez* v. *Brown*, 408 So. 2d 464 (1981) (en banc); *Cash* v. *Illinois Central Gulf R. Co.*, 388 So. 2d 871 (1980) (en banc); *McKee* v. *McKee*, 382 So. 2d 287 (1980) (en banc); *City of Jackson* v. *Capital Reporter Publishing Co.*, 373 So. 2d 802 (1979) (en banc); *Realty Title Guaranty Co.* v. *Howard*, 355 So. 2d 657 (1977) (en banc); *Couch* v. *Martinez*,

One particular decision by the Mississippi Supreme Court, decided only last year, demonstrates that the court does not consistently preclude consideration of issues raised for the first time on rehearing. In *Quinn* v. *Branning*, 404 So. 2d 1018 (1981), the court held that part of a criminal statute violated the State Constitution's prohibition against local legislation. Striking the offensive language, the court approved the rest of the statute and affirmed the underlying conviction. The defendant then petitioned for rehearing, pointing out that the affidavit against him did not allege a crime under the reformed statute. The court agreed with this contention, granted the petition in part, and reversed the conviction, all without mentioning the rule against consideration of new issues on rehearing. The striking similarity between *Quinn* and this case, both involving issues that the parties could have foreseen but that arose with urgency only after the court upheld part of a challenged statute, persuades us that the Mississippi Supreme Court is not "strictly or regularly" following a procedural rule precluding review of issues raised for the first time in a petition for rehearing. The denial of rehearing in this case, although not appearing sufficiently final to permit our immediate review, must have rested either upon a substantive rejection of petitioners' federal claim or upon a procedural rule that the state court ap-

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357 So. 2d 107 (1978) (en banc); *Foster* v. *Foster*, 344 So. 2d 460 (1977) (en banc); *McCrory* v. *State*, 342 So. 2d 897 (1977) (en banc); *Daniels* v. *State*, 341 So. 2d 918 (1977) (en banc); *Mississippi State Highway Comm'n* v. *Gresham*, 323 So. 2d 100, 103 (1975) (en banc); *Powers* v. *Malley*, 302 So. 2d 262, 264 (1974).

In *Mississippi State Highway Comm'n* v. *Gresham*, *supra*, the court expressly noted that its disposition depended upon a fact mentioned for the first time in the petition for rehearing. In several other decisions, the type of question considered on rehearing suggests that it was raised for the first time by the party petitioning for that relief. *E. g.*, *Cortez* v. *Brown*, *supra*; *City of Jackson* v. *Capital Reporter Publishing Co.*, *supra*; *Powers* v. *Malley*, *supra*. These decisions, however, do not expressly acknowledge the novelty of the points raised on rehearing.

plies only irregularly.[15] Thus, there are no independent and adequate state grounds barring our review of the federal issue.

III

Respondents do not dispute that the change in election procedures ordered by the Mississippi courts is subject to preclearance under § 5.[16] They urge, however, that the Voting

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[15] Respondents also contend that our decisions establish a general rule against review of questions presented for the first time in a petition for rehearing. We have recognized that, under many circumstances, "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration here." *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 128 (1945). At the same time, however, we have explained that this bar does not apply if "the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition." *Ibid.* In this case we conclude that the Mississippi Supreme Court's first judgment on appeal either decided the federal question on the merits, although in a manner that did not appear final, or avoided the federal question by invoking an inconsistently applied procedural rule. If petitioners had made their claim prior to the court's original disposition, either of these circumstances would have permitted us to review the federal question.

[16] Mississippi plainly is one of the jurisdictions covered by the statute. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 318 (1966); 30 Fed. Reg. 9897 (1965). The Louisville School District Board of Trustees, like all political entities within the State, accordingly must comply with § 5's strictures. See *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 46 (1978); *United States* v. *Board of Commissioners of Sheffield*, 435 U. S. 110 (1978). It is immaterial that the change sought by respondents derives from a statute that predates the Voting Rights Act, because § 5 comes into play whenever a covered jurisdiction departs from an election procedure that was "*in fact* 'in force or effect' . . . on November 1, 1964." *Perkins* v. *Matthews*, 400 U. S. 379, 395 (1971) (emphasis in original).

Finally, the presence of a court decree does not exempt the contested change from § 5. We held only last Term that § 5 applies to any change "reflecting the policy choices of the elected representatives of the people," even if a judicial decree constrains those choices. *McDaniel* v. *Sanchez*, 452 U. S. 130, 153 (1981). Although *McDaniel* involved a reapportionment plan drafted pursuant to a federal court's order, its interpretation of § 5 is equally instructive here. When state or local officials comply with a

Rights Act deprives state courts of the power even to decide whether § 5 applies to a proposed change in voting procedures.[17] Under their analysis of the Act, a state court asked to implement a change in the State's voting laws could not inquire whether the change was subject to § 5. Even if the change plainly fell within § 5, the court would have to ignore that circumstance and enter a decree violating federal law. Both the language and purposes of the Voting Rights Act refute this notion.

Only last Term we summarized the principles governing state court jurisdiction to decide federal issues. *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473 (1981). We begin, in every case, "with the presumption that state courts enjoy concurrent jurisdiction" over those claims. *Id.*, at 478. Only "an explicit statutory directive, [an] unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests" will rebut the presumption. *Ibid.* Most important for our purposes, even a finding of exclusive federal jurisdiction over claims arising under a federal statute usually "will not prevent a state court from deciding a federal question collaterally." *Id.*, at 483, n. 12.[18]

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court order to enforce a state statute, there is no doubt that their actions "reflec[t] the policy choices of . . . elected representatives." Indeed, if § 5 did not encompass this situation, covered jurisdictions easily could evade the statute by declining to implement new state statutes until ordered to do so by state courts. Cf. *McDaniel* v. *Sanchez*, *supra*, at 151 (noting that "if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, [§ 5] might have the unintended effect of actually encouraging delay in making obviously needed changes in district boundaries"). In light of *McDaniel*, we conclude that a state court decree directing compliance with a state election statute contemplates "administ[ration]" of the state statute within the meaning of § 5.

[17] Respondents do not claim that Mississippi law restricts the state courts' power to decide questions related to § 5.

[18] We frequently permit state courts to decide "collaterally" issues that would be reserved for the federal courts if the cause of action arose directly

Respondents rest their jurisdictional argument on three sections of the Act. Section 14(b) provides that "[n]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to . . . section 5 . . . ." 79 Stat. 445, 42 U. S. C. § 1973*l*(b). We have already held, however, that this provision governs only declaratory judgments approving proposed changes in voting procedure. Other courts may decide the distinct question of whether a proposed change is subject to the Act. See *Allen* v. *State Board of Elections*, 393 U. S. 544, 557–560 (1969); *McDaniel* v. *Sanchez*, 452 U. S. 130 (1981).

Sections 5 and 12(f) of the Act provide somewhat stronger support for respondents' claim. Section 5 provides that "[a]ny action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code," 79 Stat. 439, 42 U. S. C. § 1973c, while § 12(f) declares that "[t]he district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section." 79 Stat. 444, 42 U. S. C. § 1973j(f).[19] It is possible that these sections grant the federal courts exclusive jurisdiction over

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under federal law. For example, the state courts may decide a variety of questions involving the federal patent laws. *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257 (1916); *New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U. S. 473 (1912); *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255 (1897). Similarly, although state courts lack jurisdiction to entertain suits brought pursuant to § 4 of the Clayton Act, 15 U. S. C. § 15, they often decide issues concerning the federal antitrust laws in other contexts. See, *e. g.*, *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); *Bement* v. *National Harrow Co.*, 186 U. S. 70 (1902), quoted with approval in *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. 72, 81–82, n. 7 (1982). See generally Note, Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 70 Harv. L. Rev. 509, 510–511 (1957).

[19] Section 12(d) authorizes preventive relief against persons "engaged or . . . about to engage in any act or practice prohibited by" designated sections of the Voting Rights Act. 79 Stat. 444, 42 U. S. C. § 1973j(d).

"action[s] under" § 5 or "proceedings instituted pursuant" to § 12.[20] We need not resolve that question in this case, however, because respondents' state suit fell within neither of these categories. Instead, respondents' initial suit was an action to compel compliance with a forgotten state law.[21] Nothing in § 5 or § 12 negates the presumption that, at least when the issue arises collaterally, state courts may decide whether a proposed change in election procedure requires preclearance under § 5.

The policies of the Act support the same result.[22] The Voting Rights Act "implemented Congress' firm intention to rid the country of racial discrimination in voting." *Allen* v. *State Board of Elections*, *supra*, at 548. Fearing that covered jurisdictions would exercise their ingenuity to devise new and subtle forms of discrimination, Congress prohibited those jurisdictions from implementing any change in voting procedure without obtaining preclearance under § 5. Granting state courts the power to decide, as a collateral matter, whether § 5 applies to contemplated changes in election procedures will help insure compliance with the preclearance scheme.[23] Approval of this limited jurisdiction also avoids

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[20] At least one state court has ruled that it lacks jurisdiction over claims arising under the Voting Rights Act. *Ortiz* v. *Thompson*, 604 S. W. 2d 443 (Tex. Civ. App. 1980). See also *Beatty* v. *Esposito*, 411 F. Supp. 107 (EDNY 1976) (finding that state court lacked jurisdiction to decide § 5 issue, without explaining whether state suit arose under the Voting Rights Act).

[21] Respondents also based their suit on the Fourteenth Amendment. See n. 4, *supra*.

[22] Neither the parties nor the United States, appearing as *amicus curiae*, has cited any legislative history bearing upon state court jurisdiction to decide issues arising under the Voting Rights Act.

[23] As respondents point out, state court jurisdiction to decide these collateral issues is not absolutely necessary to effectuate the Act's scheme, because interested parties have the ability to seek relief from a federal district court. Recognition of a limited state power to address § 5 issues, however, furthers the Act's ameliorative purposes by permitting additional tribunals to enforce its commands. It also insures that the question of cov-

placing state courts in the uncomfortable position of ordering voting changes that they suspect, but cannot determine, should be precleared under § 5. Accordingly, we hold that the Mississippi courts had the power to decide whether § 5 applied to the change sought by respondents.

If the Mississippi courts had the power to make this determination, then it is clear that they also had the duty to do so. "State courts, like federal courts, have a constitutional obligation . . . to uphold federal law." *Stone* v. *Powell*, 428 U. S. 465, 494, n. 35 (1976) (citing *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 341–344 (1816)). Section 5 declares that whenever a covered jurisdiction shall "enact or seek to administer any . . . standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," see n. 1, *supra*, it must obtain either preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia. Our opinions repeatedly note that failure to follow either of these routes renders the change unenforceable. See, *e. g.*, *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 46 (1978); *United States* v. *Board of Supervisors*, 429 U. S. 642, 645 (1977) *(per curiam)*. When a party to a state proceeding asserts that § 5 renders the con-

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erage will be addressed at the earliest possible time, without requiring duplicative lawsuits.

We find little force in respondents' claim that, if the state courts possess jurisdiction to decide § 5 issues arising in disputes between private parties, they will frustrate the Attorney General's enforcement of the Act by interpreting the preclearance requirement conservatively. The Attorney General is not bound by the resolution of § 5 issues in cases to which he was not a party. *City of Richmond* v. *United States*, 422 U. S. 358, 373–374, n. 6 (1975). Common notions of collateral estoppel suggest that the state proceedings similarly would not bind other interested persons who did not participate in them. See Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977). Persons dissatisfied with a state court's collateral resolution of a § 5 issue in proceedings involving other parties, therefore, are likely to be able to litigate the issue anew in federal court.

templated relief unenforceable, therefore, the state court must examine the claim and refrain from ordering relief that would violate federal law.[24]

IV

Our holding mandates reversal of the lower court judgment. Under our analysis, the change in election procedure is subject to § 5, see n. 16, *supra*, and the Mississippi courts may not further implement that change until the parties comply with § 5. At this time, however, we need not decide whether petitioners are entitled to any additional relief. The United States has initiated a federal suit challenging the change at issue here, see n. 8, *supra*, and we agree with the Solicitor General that the District Court entertaining that suit should address the problem of relief in the first instance. As we noted in *Perkins* v. *Matthews*, 400 U. S. 379, 395–397 (1971), a local district court is in a better position than this Court to fashion relief, because the district court "is more familiar with the nuances of the local situation" and has the opportunity to hear evidence. *Id.*, at 397. In this case, the District Court for the Northern District of Mississippi will be better able to decide whether a special election is necessary, whether a more moderate form of interim relief will satisfy § 5,[25] or whether new elections are so imminent that special relief is inappropriate. We hold only that the Mississippi

[24] Our holding does not prevent state courts from attempting to accommodate both state and federal interests. A state court, for example, might adopt the approach followed by the Chancery Court in this case, and order the parties to submit the proposed relief to the Attorney General. If the Attorney General registers an objection, the court might then order the parties to seek a declaratory judgment from the District Court for the District of Columbia.

[25] For example, since the Attorney General objected only to the runoff procedure, the District Court simply might void the results of any runoff elections, permitting the candidates who gathered a plurality of votes in the general election to take those seats. We, of course, intimate no view on the best form of relief, leaving that matter to the District Court's discretion.

courts must withhold further implementation of the disputed change in election procedures until the parties demonstrate compliance with § 5. Accordingly, the judgment of the Mississippi Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE POWELL concurs in the judgment.

JUSTICE REHNQUIST, dissenting.

The provisions of §§ 5, 12(f), and 14(b) of the Voting Rights Act, referred to in the opinion of the Court, *ante*, at 265–268, convince me that Congress did not intend the state courts to play a role in the enforcement of that Act. In *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473 (1981), upon which the Court heavily relies for its contrary conclusion, we said:

> "The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." *Id.*, at 483–484 (footnotes omitted).

It seems to me that each of these factors counsels in favor of exclusive federal-court jurisdiction, and I do not understand the Court to contend otherwise.

From a practical point of view, I think the Court's decision is bound to breed conflicts between the state courts and the federal district courts sitting within the States, each of which may now determine whether or not a particular voting change must be precleared with the Attorney General before being enforced in a covered jurisdiction. Indeed, the precursor of such conflict may well be found in the Court's concluding observations that the District Court for the Northern District of Mississippi, in which the United States has pending a suit pertaining to the change involved in this case, should proceed to make determinations under the Voting

Rights Act before the state court whose judgment we are reviewing renders further remedy in this case. Exactly what is to be left to the States under this construction is more than a little problematical.

I do not think that the goals of the Voting Rights Act will be materially advanced by the Court's somewhat tortured effort to make the state courts a third line of enforcement for the Act, after the District Court for the District of Columbia and other federal district courts. The principal effect of today's decision will be to enable one or the other of parties such as those involved in this case, neither of whom were intended to be primary beneficiaries of the Voting Rights Act, to employ the Act as another weapon in their arsenal of litigation strategies.

Syllabus

CALIFORNIA EX REL. STATE LANDS COMMISSION *v.* UNITED STATES

ON CROSS-MOTIONS FOR JUDGMENT

No. 89, Orig. Argued March 29, 1982—Decided June 18, 1982

Held: The United States, not California, has title to oceanfront land created through accretion, resulting from construction of a jetty, to land owned by the United States on the coast of California. Pp. 278–288.

(a) A dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal law. *Hughes* v. *Washington*, 389 U. S. 290; *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653. Under federal law, accretion, whatever its cause, belongs to the upland owner. Pp. 278–283.

(b) This is not a case where, as a matter of choice of law, state law should be borrowed and applied as the federal rule for deciding the substantive legal issue. Congress addressed the issue of accretions to federal land in the Submerged Lands Act, which vested title in the States to the lands underlying the territorial sea and confirmed the title of the States to the tidelands up to the line of mean high tide, but which in § 5 withheld from the grant to the States all "accretions" to coastal lands acquired or reserved by the United States. In light of this latter provision, borrowing for federal-law purposes a state rule that would divest federal ownership is foreclosed. Moreover, this is not a case in which federal common law must be created, since it has long been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner. Pp. 283–285.

(c) Only land underneath inland waters was included in the initial grant to the States under the equal-footing doctrine, *United States* v. *California*, 332 U. S. 19, and hence California cannot properly claim that title to the land in question here was vested in the State by that doctrine and confirmed by the Submerged Lands Act. The latter Act was a constitutional exercise of Congress' power to dispose of federal property and "did not impair the validity" of the *United States* v. *California* decision, *United States* v. *Louisiana*, 363 U. S. 1, 7, 20. To accept California's argument would require rejecting not only *Hughes*, *supra*, but also the established federal rule that accretions belong to the upland owner. Pp. 285–286.

(d) Section 2(a)(3) of the Submerged Lands Act, defining "lands beneath navigable waters" that fall within the Act's general grant to the

States as including all "made" lands that formerly were lands beneath navigable water, does not apply to the gradual process by which sand accumulated along the shore, although caused by a jetty. To the extent that accretions are to be considered "made" land, they would fall within the reservation by the United States in the Act of "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." In any event, § 5(a) of the Act expressly withholds from the grant to the States all "accretions" to lands reserved by the United States. Pp. 286–288.

(e) Section 3(a) of the Submerged Lands Act, confirming the title of persons who, on June 5, 1950, were entitled to lands beneath navigable water "under the law of the respective states in which the land is located," means nothing more than that state law determines the proper beneficiary of the grant of land under the Act. Federal law determines the scope of the grant under the Act in the first instance. P. 288.

The United States' motion for judgment on the pleadings granted.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 288.

Bruce S. Flushman, Deputy Attorney General of California, argued the cause for plaintiff. With him on the briefs were *George Deukmejian*, Attorney General, *N. Gregory Taylor*, Assistant Attorney General, and *Dennis M. Eagan* and *Patricia Sheehan Peterson*, Deputy Attorneys General.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, and *Michael W. Reed*.*

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*A brief of *amici curiae* was filed for the State of Washington et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, *Malachy R. Murphy*, Deputy Attorney General, and *Robert C. Hargreaves*, Assistant Attorney General; *Charles A. Graddick*, Attorney General of Alabama, and *Sarah M. Spratling*, Assistant Attorney General; *Wilson L. Condon*, Attorney General of Alaska, and *G. Thomas Koester*, Assistant Attorney General; *Robert K. Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Solicitor General; *Tany S. Hong*, Attorney General of Hawaii, and *Johnson H. Wong*, Deputy Attorney General; *Jeff Bingaman*, Attorney

JUSTICE WHITE delivered the opinion of the Court.

The issue before the Court is the ownership of oceanfront land created through accretion to land owned by the United States on the coast of California. The decision turns on whether federal or state law governs the issue.

I

From the time of California's admission to the Union in 1850, the United States owned the upland on the north side of the entrance channel to Humboldt Bay, Cal. In 1859 and 1871, the Secretary of the Interior ordered that certain of these lands, which fronted on the Pacific Ocean, the channel, and Humboldt Bay be reserved from public sale.[1] Since that time the land has been continuously possessed by the United States and used as a Coast Guard Reservation. The Pacific shoreline along the Coast Guard site remained substantially unchanged until near the turn of the century when the United States began construction of two jetties at the entrance to Humboldt Bay.[2] The jetty constructed on the north side of the entrance resulted in fairly rapid accretion on the ocean side of the Coast Guard Reservation, so that formerly submerged lands became uplands.[3] One hundred and eighty-

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General of New Mexico, and *J. Scott Hall*, Special Assistant Attorney General; and *Dave Frohnmayer*, Attorney General of Oregon, and *Peter Herman*, Senior Assistant Attorney General.

[1] Secretarial Order, December 27, 1859; Secretarial Order, August 19, 1871. See Exhibit C to Exhibits in Support of California's Motion for Leave to File Complaint.

[2] Construction of the jetties commenced on the South Spit in 1889 and on the North Spit in 1890. U. S. Army Corps of Engineers, San Francisco District, Survey Report on Humboldt Bay, California, App. I, Shoreline Changes 2–3, 8–9 (Feb. 10, 1950), Exhibit D (hereafter cited as Corps Report). The north jetty was a massive work, having a total length of 7,500 feet.

[3] The United States and California agree that the seaward shift of the shoreline was caused by the construction of the jetties. A study by the Army Corps of Engineers found:

four acres of upland were created by the seaward movement of the ordinary high-water mark. This land, which remains barren save for a watchtower, is the subject of the dispute in this case.

The controversy arose in 1977 when the Coast Guard applied for permission from California to use this land to construct the watchtower.[4] At this time it became evident that both California and the United States asserted ownership of the land. The United States eventually built the watchtower without obtaining California's permission.[5] Invoking our original jurisdiction, California then filed this suit to

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"With the inauguration of jetty construction in 1890, there began a series of interruptions in normal littoral transport [of sand]. With each increment in length of the jetties the [Humboldt] bar was pushed seaward. Consequent decrease in offshore depths caused the shore to advance on each side of the inlet." *Id.*, at 8, ¶21.

After jetty construction,

". . . the Humboldt bar . . . shifted and reformed seaward of its 1870 position, and the ocean high-water shore line along the north spit . . . shifted seaward. The seaward advance of the north spit shore line was most pronounced upon reconstruction of the north jetty in 1917." *Id.*, at 9, ¶25.

[4] California does not contend that, having applied for a state permit, the United States is estopped from asserting its claim to ownership of the disputed land. Tr. of Oral Arg. 5–6. Such an argument is foreclosed by *United States* v. *California*, 332 U. S. 19, 39–40 (1947) (footnote omitted): "[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." See also *United States* v. *City and County of San Francisco*, 310 U. S. 16, 31–32 (1940); *Utah* v. *United States*, 284 U. S. 534, 545–546 (1932).

[5] In May 1978, California transmitted a proposed permit to the United States to allow construction of the watchtower. See Corps Report, Exhibit F. A few days later, the Bureau of Land Management of the Department of the Interior formally advised the Coast Guard and the California Commission that the United States claimed the disputed acreage as accretion. Letter of June 5, 1978, attached to Corps Report, Exhibit G. The proposed permit was never executed.

quiet title to the subject land.[6] We granted leave for California to file a bill of complaint. 454 U. S. 809 (1981).

California alleges that upon its admission to the Union on September 9, 1850, Act of Sept. 9, 1850, 9 Stat. 452, and by confirmation in the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, California became vested with absolute title to the tidelands and the submerged lands upon which, after construction of the jetties, alluvion was deposited, resulting in formation of the subject land. Because the accretion formed on sovereign state land, California maintains that its law should govern ownership. Under California law, a distinction is drawn between accretive changes to a boundary caused by natural forces and boundary changes caused by the construction of artificial objects. For natural accretive changes, the upland boundary moves seaward as the alluvion is deposited, resulting in a benefit to the upland owner. *Los Angeles* v. *Anderson*, 206 Cal. 662, 667, 275 P. 789, 791 (1929). When accretion is caused by construction of artificial works, however, the boundary does not move but becomes fixed at the ordinary high-water mark at the time the artificial influence is introduced. *Carpenter* v. *Santa Monica*, 63 Cal. App. 2d 772, 794, 147 P. 2d 964, 975 (1944). It is not disputed that the newly formed land in controversy was created by the construction of the jetty. Therefore, if state law governs, California would prevail.

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[6] Disputes between a State and the United States over ownership of property are fully within our original jurisdiction over cases in "which a State shall be Party," Art. III, § 2, cl. 2. Although our jurisdiction over this matter is concurrent with that of the district courts, *California* v. *Arizona*, 440 U. S. 59, 65 (1979); 28 U. S. C. § 1251(b)(2), we have previously indicated that coastal boundary disputes are appropriately brought as original actions in this Court. *United States* v. *Alaska*, 422 U. S. 184, 186, n. 2 (1975).

The United States has waived its immunity to suit in actions brought against it to quiet title to land. 28 U. S. C. § 1346(f). See *California* v. *Arizona*, *supra*, at 65–68.

By its answer, and supporting memoranda, the United States contends that the formerly submerged lands were never owned by California before passage of the Submerged Lands Act in 1953, and that the disputed land was not granted to California by the Act. The United States also submits that the case is governed by federal rather than state law and that under long-established federal law, accretion, whatever its cause, belongs to the upland owner. *Jones* v. *Johnston*, 18 How. 150, 156 (1856); *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66 (1874); *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 189–193 (1890); *Beaver* v. *United States*, 350 F. 2d 4, 10–11 (CA9 1965).[7] If such federal law controls, title to the deposited land vested in the United States as the accretions formed.

Recognizing that the choice-of-law issue was clearly drawn, California moved for summary judgment and the United States moved for judgment on the pleadings. No essential facts being in dispute, a special master was not appointed and the case was briefed and argued. We conclude that federal law governs the decision in this case and that the land in dispute is owned by the United States.

II

In *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10 (1935), the city filed suit to quiet its title to land claimed to be tideland and to belong to the city by virtue of a grant from the State. The defendant claimed by virtue of a patent from the United States issued after California entered the Union. In an opinion by Chief Justice Hughes, and with a single dis-

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[7] California's claim that *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 672 (1979), determined that there was no "federal common law" of accretion and avulsion, is a misunderstanding of that decision. We said only that "[t]he federal law applied in boundary cases . . . does not necessarily furnish the appropriate rules to govern" a case not involving a boundary dispute. Too much is also read into dictum in *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, 380–381, n. 8 (1977), taking issue with the dissent's meaning of the term "federal common law."

sent, the Court held that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850; that it remained to be determined whether the land at issue was tideland; and that this issue was "necessarily a federal question" controlled by federal law. The Court said:

> "Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer* v. *Bird*, 137 U. S. 661, 669, 670; *Brewer-Elliott Oil Co.* v. *United States*, 260 U. S. 77, 87; *United States* v. *Holt Bank*, 270 U. S. 49, 55, 56; *United States* v. *Utah*, 283 U. S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney* v. *Keokuk*, 94 U. S. 324, 338; *Shively* v. *Bowlby*, [152 U. S. 1,] 40; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56, 63." *Borax Consolidated, Ltd.* v. *Los Angeles*, *supra*, at 22.

The Court went on to hold that tidelands extend to the mean high-water line, which the Court then defined as a matter of federal law.

There was no question of accretions to the shoreline of the property involved in *Borax*. But some 30 years later, Mrs. Stella Hughes, the successor in interest to the owner of oceanfront property patented by the United States prior to

the entry of the State of Washington into the Union, sued the State seeking to quiet her title to accretions that had become attached to her land and that had caused a seaward movement of the shoreline. Under Washington law, the accretions belonged to the State, the owner of the tidelands, and Mrs. Hughes would no longer own property fronting on the ocean. Under federal law accretions are the property of the upland owner. The trial court found that federal law applied. The Washington Supreme Court reversed, holding that Washington law applied and that the State owned any land that accreted after statehood. *Hughes* v. *State*, 67 Wash. 2d. 799, 410 P. 2d 20 (1966).

We in turn reversed, reaffirming the decision in *Borax* that federal law determined the boundary between state-owned tidelands and property granted under a federal patent and holding that the same law applied to determine the boundary between state-owned tidelands and oceanfront property where accretions had extended the shoreline seaward. *Hughes* v. *Washington*, 389 U. S. 290 (1967).[*] The justification for employing federal law was the special nature of the coastal boundary question: "The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the Land.'" *Id.*, at 293. We went on to decide that under federal law, the federal grantee of the uplands had the right to the accumulated accretions.

Except for the fact that in the present case the upland to which the accretions attached has always been owned by the United States, this case and *Hughes* are similarly situated.

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[*] All participating Justices joined except Justice Stewart, who concurred on grounds that the State's claim to the property constituted a taking without compensation. He rejected the majority's application of federal law to the question. JUSTICE MARSHALL took no part in the case.

Unless *Hughes* is to be overruled, judgment must be entered for the United States.

California urges that for all intents and purposes *Hughes* has already been eviscerated by *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977). *Corvallis* involved a dispute between the State of Oregon and an Oregon corporation over the ownership of land that became part of a riverbed because of avulsive changes in the river's course. The Oregon Court of Appeals affirmed the trial court's award of the land to the corporation because that was the result dictated by federal common law, which, under *Bonelli Cattle Co.* v. *Arizona*, 414 U. S. 313 (1973), was the proper source of law. A majority of this Court reversed, overruling *Bonelli* and holding that the disputed ownership of the riverbed should be decided solely as a matter of Oregon law. *Bonelli*'s error was said to have been reliance on the equal-footing doctrine as a source of federal common law.[9] Once the equal-footing doctrine had vested title to the riverbed in Arizona, "it did not operate after that date to determine what effect on titles the movement of the river might have." 429 U. S., at 371. State, rather than federal law, should have been applied.

California urges that in rejecting *Bonelli* and holding that disputes about the title to lands granted by the United States are to be settled by state law, the Court also rejected *Hughes* since that case involved land that had been patented by the United States to private owners. We do not agree. *Corvallis* itself recognized that federal law would continue to apply if "there were present some other principle of federal law requiring state law to be displaced." 429 U. S., at 371. For example, the effects of accretive and avulsive changes in the

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[9] The equal-footing principle holds that all States admitted to the Union possess the same rights and sovereignty as the original 13 States. *Pollard's Lessee* v. *Hagan*, 3 How. 212, 229 (1845); *Shively* v. *Bowlby*, 152 U. S. 1, 26, 30 (1894).

course of a navigable stream forming an interstate boundary is determined by federal law. *Id.*, at 375. The *Corvallis* opinion also recognized that *Bonelli* did not rest upon *Hughes* and that the *Hughes* Court considered oceanfront property "sufficiently different . . . so as to justify a 'federal common law' rule of riparian proprietorship." 429 U. S., at 377, n. 6. The *Corvallis* decision did not purport to disturb *Hughes*.

Wilson v. *Omaha Indian Tribe*, 442 U. S. 653 (1979), made clear that *Corvallis* also does not apply "where the [United States] Government has never parted with title and its interest in the property continues." 442 U. S., at 670.[10] The dispute in *Corvallis* was between the State and a private owner of land previously in federal possession. In contrast, the riparian owner in *Wilson* was the United States, holding reservation land in trust for the Omaha Indian Tribe. The issue was the effect of accretive or avulsive changes in the course of a navigable stream. State boundaries were not involved. What we said in *Wilson* is at least equally applicable here where the United States has held title to, occupied, and utilized the littoral land for over 100 years: "[T]he general rule recognized by *Corvallis* does not oust federal law in this case. Here, we are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest." 442 U. S., at 670.

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[10] The majority opinion in *Corvallis* appears to recognize that its rule does not extend to land remaining in federal hands:

"'We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to these laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation;* so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.'" 429 U. S., at 377 (quoting *Wilcox* v. *Jackson*, 13 Pet. 498, 517 (1839); emphasis added by *Corvallis* Court).

We conclude, based on *Hughes* v. *Washington* and *Wilson* v. *Omaha Indian Tribe*, that a dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal law.

III

Controversies governed by federal law do not inevitably require resort to uniform federal rules. *Wilson* v. *Omaha Indian Tribe*, *supra*, at 672. It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand. *Board of Commissioners of Jackson County* v. *United States*, 308 U. S. 343 (1939); *Royal Indemnity Co.* v. *United States*, 313 U. S. 289 (1941). This is not such a case. First, and dispositive in itself, is the fact that Congress has addressed the issue of accretions to federal land. The Submerged Lands Act, 43 U. S. C. § 1301 *et seq.*, vested title in the States to the lands underlying the territorial sea, which, in California's case, extended three miles seaward from the ordinary low-water line. The Act also confirmed the title of the States to the tidelands up to the line of mean high tide. Section 5(a) of the Act, however, withheld from the grant to the States all "accretions" to coastal lands acquired or reserved by the United States.[11] 43 U. S. C. § 1313(a). In

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[11] In relevant part, § 5(a) of the Act, 62 Stat. 32, 43 U. S. C. § 1313(a), excepts from the grant to the States

"all tracts or parcels of land together with all accretions thereto, . . . title to which has been lawfully and expressly acquired by the United States . . . and . . . all lands expressly retained by or ceded to the United States when the State entered the Union . . . ."

Although "accretions" are expressly mentioned only in connection with federal "acquired lands," accretions to retained lands should be similarly excepted from the grant to the States. Former Solicitor General Cox, in an opinion approved by the Attorney General, explained:

"There can be no doubt that Congress intended each of the various categories of lands excepted by section 5(a) to include accretions. The terms

light of this provision, borrowing for federal-law purposes a state rule that would divest federal ownership is foreclosed. In *Wilson*, where we did adopt state law as the federal rule, no special federal concerns, let alone a statutory directive, required a federal common-law rule.

Moreover, this is not a case in which federal common law must be *created*. For over 100 years it has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner. *New Orleans* v. *United States*, 10 Pet. 662, 717 (1836); *County of St. Clair* v. *Lovingston*, 23 Wall., at 68. "'Almost all jurists and legislators, . . . both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions.'" *Jefferis* v. *East Omaha Land Co.*, 134 U. S., at 189, quoting *Banks* v. *Ogden*, 2 Wall. 57, 67 (1865). We rejected the invitation to rely on state law in *Hughes*, which California readily admits is a case "in which the facts and issues are essentially identical," Statement in Support of Motion for Leave to File Complaint 16, and we see no reason at this juncture to adopt California's minority rule on artificial accretions,[12] even if we were free to do so.

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of section 5(a) make this clear. The customary rights of landowners are set forth in full in the first of the several exceptions listed in section 5(a). Thus, it speaks of 'all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon . . . .' Each of the other exceptions speaks simply of 'all lands.' Obviously, the more comprehensive word 'lands' was used instead of 'tracts or parcels of land' and the explicit reference to accretions, resources and improvements was omitted in order to avoid repetition. There is no reasonable basis for any other conclusion. Congress would not have limited its exceptions of 'all accretions thereto, resources therein, or improvements thereon' to lands 'lawfully and expressly acquired by the United States' from any State or its grantees and then denied them where the lands were 'expressly retained' or 'acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity. . . .'" 42 Op. Atty. Gen. 241, 264 (1963).

[12] In *United States* v. *California*, O. T. 1951, No. 6, Orig., California argued that the "Court should adopt the federal rule that accretions formed

Applying the federal rule that accretions, regardless of cause, accrue to the upland owner, we conclude that title to the entire disputed land in issue is vested in the United States.

IV

Despite *Hughes* and *Wilson*, California claims ownership of the disputed lands because all of the accretions were deposited on tidelands and submerged lands, title to which, California submits, was vested in the State by the equal-footing doctrine and confirmed by the Submerged Lands Act. But California's claim to the land underlying the territorial sea was firmly rejected in *United States* v. *California*, 332 U. S. 19 (1947), which held that only land underneath inland waters was included in the initial grant to the States under the equal-footing doctrine. Furthermore, the Submerged Lands Act was a constitutional exercise of Congress' power to dispose of federal property, *Alabama* v. *Texas*, 347 U. S. 272, 273–274 (1954), and "did not impair the validity" of the *California* decision, *United States* v. *Louisiana*, 363 U. S. 1, 7, 20 (1960).[13] In any event, whatever the ownership of the submerged lands, this approach, based as it is on the equal-footing doctrine and the federal statute, is not a claim that state law should govern but a claim that the historic rule that accretions belong to the upland owner is wrong and should be

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by gradual and imperceptible degrees even though induced by artificial structures accrue to the owner of the adjoining land." Brief in Relation to Report of Special Master 90. California suggested "ample reasons why [the] exceptional California view should not be extended and applied in determining the boundaries of the marginal sea off California." *Id.*, at 91. Those reasons included the fact that the California rule is contrary to that adopted by courts of most other States, that the application of state law would lead to varying results in different States, and that the California rule was devised for wholly inapplicable reasons.

[13] See also *Alabama* v. *Texas*, 347 U. S., at 273–274; *United States* v. *California*, 381 U. S. 139, 145–148 (1965); *United States* v. *Louisiana*, 389 U. S. 155, 156–157 (1967); *Texas Boundary Case*, 394 U. S. 1, 2 (1969); *United States* v. *Maine*, 420 U. S. 515, 524–526 (1975); *United States* v. *Louisiana*, 446 U. S. 253, 256, 268 (1980).

replaced with a rule awarding title to the owner of the land on which the accretions took place. To accept this submission, however, would require rejecting not only *Hughes*, but also the long-established federal rule that accretions belong to the upland owner—a doctrine consistent with the majority rule prevailing in the States. See Part III, *supra*. Indeed, the proposed rule is also inconsistent with California's own law that accretions attributable to natural causes belong to the upland owner. For all these reasons, we refuse the invitation to depart from the long-settled rule.[14]

Independent of the above analysis, California claims that the United States expressly surrendered title to the disputed land through the Submerged Lands Act. California argues the subject land falls within the general grant to the States of "lands beneath navigable waters." Section 2(a)(3) of the Act defines "lands beneath navigable waters" to include "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters." 43 U. S. C. § 1301(a)(3). Because the jetty construction caused fairly rapid accretion, and, but for the construction of the jetties, the subject land would have remained submerged, California submits the accretion-formed land is "made" land, whose title rests in California by virtue of the Submerged Lands Act.

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[14] For the same reasons, we reject California's alternative theory that the equal-footing doctrine vests title in the State to all lands that ever were tidelands. California argues that as deposition occurred on submerged land, these areas went to a tideland phase—vesting title in the State—before eventually emerging as uplands. Federal law governs the scope of title initially vested by the equal-footing doctrine; at most, this argument suggests a different federal rule should apply to former tidelands. The suggestion has little to recommend it. Even leaving aside the concerns expressed in text, we see no reason for an exceptional rule to apply to land that once was, but no longer is, tideland. Moreover, implementation of the rule would require plotting the high- and low-water lines at all intervening times between statehood and the present.

We do not read this provision of the Act as applying to the gradual process by which sand accumulated along the shore, although caused by a jetty affecting the action of the sea.[15] Moreover, to the extent that the accretions are to be considered "made" land, they would fall within the reservation by the United States of "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." This follows from the congressional object to assure each sovereign the continuing benefit of landfill and like work performed by each.[16] In any event, § 5(a) of the Act expressly withholds from the grant to the States all "accretions" to lands reserved by the United States, and both California and the United States agree that the exposure of the formerly submerged lands in dispute constitutes "accretion." This reading of the Act adheres to the principle that federal grants are to be construed strictly in favor of the United States. *United States* v. *Grand River Dam Authority*, 363 U. S. 229, 235 (1960);

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[15] The word "made" was inserted into the provision in a bill introduced by Congressman Walter. H. R. 8137, 81st Cong., 2d Sess., § 2(a)(2) (1950). The Report on that measure describes it as "in substance, the same" as earlier proposals omitting the term. H. R. Rep. No. 2078, 81st Cong., 2d Sess., 3 (1950). Throughout Congress' consideration of the bill there was no comment on the "made" land provision. No Member of either House ever suggested that § 1301(a)(3) covered accretions that were attributable to artificial works. Against this background, we find no significance in the two casual references by Robert Moses and Senator Daniel to naturally formed accretions as "made." Hearings on S. J. Res. 13 et al. before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 158 (1953) (remarks of Robert Moses); *id.*, at 193–194 (remarks of Sen. Daniel).

[16] The interpretive opinion rendered by former Solicitor General Cox, while including naturally formed islands within the "made" language of § 2(a)(3), rejects the suggestion that accretion to the mainland, whether or not directly attributable to artificial causes, is included in the Submerged Lands Act grant to the States. 42 Op. Atty. Gen., at 259–265, 266–267. We express no opinion on the Act's treatment of naturally formed islands in the marginal sea.

United States v. *Union Pacific R. Co.*, 353 U. S. 112, 116 (1957).

Finally, California submits that the Act granted title to the State by confirming the title of persons who, on June 5, 1950, were entitled to such lands "under the law of the respective States in which the land is located . . . ." 43 U. S. C. § 1311(a). This provision means nothing more than that state law determines the proper beneficiary of the grant of land under the Act; it is clear that federal law determines the scope of the grant under the Act in the first instance.

V

We reaffirm today that federal law determines the boundary of oceanfront lands owned or patented by the United States. Applying the federal rule that accretions of whatever cause belong to the upland owner, we find that title to the disputed parcel rests with the United States. Accordingly, California's motion for summary judgment is denied, and the United States' motion for judgment on the pleadings is granted. The parties, or either of them, may, before September 27, 1982, submit a proposed decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring in the judgment.

I concur in the judgment. I believe that our decision in *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653 (1979), requires the application of federal common law to resolve this title dispute between the United States and California, and that § 5(a) of the Submerged Lands Act indicates the source of that law.

The dispute in this case concerns the ownership of artificially caused accretions on oceanfront property belonging to

the United States. The dispute centers on the legal effect of the movement of the "mean high-water mark." That mark separates the fastlands continuously owned by the United States from the "tidelands"—the area of partially submerged lands between the mean high- and low-water marks. California's claim of title to the tidelands is based upon the equal-footing doctrine. Because the tidelands belong to it and because the accretions formed on the tidelands, California contends that state law applies to resolve this title dispute between it and the United States. The rule adopted by the California courts regarding artificially caused accretions holds that title to accreted land vests with the State rather than the riparian or littoral owner. The United States contends that federal common law applies and argues that the federal common-law rule holds that title to land formed by accretion vests in the owner of the riparian land.

The dispute in this case is similar to that in *Wilson* v. *Omaha Indian Tribe*. We held in *Wilson* that federal common law and not state law governs title disputes resulting from changes in the course of a navigable stream where an instrumentality of the Federal Government is the riparian owner. 442 U. S., at 669–671. The rule of *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977), was distinguished. The *Corvallis* rule—that state law governs—applies where the dispute over the legal effect of a shifting riverbed does not involve claims of title by a federal instrumentality.

I agree with the Court that the *Wilson* rule applies to oceanfront property as well as riverfront property where the Federal Government is the littoral owner. *Wilson* should apply to the movement of the high-water mark along the ocean in a fashion similar to the way it applies to changes in the bed of a navigable stream. In the instant case, as in *Wilson*, it is irrelevant that the accretion, as a geographical "fact," formed on land within the State's dominion, be it a river bottom or the ocean tidelands. The fact is that both

Wilson and the instant case concern title disputes over changes in the shoreline where the Federal Government owns land along the shoreline.

In *Wilson*, we held that state law supplied the applicable rule of decision even though federal common law applied to resolve the title dispute. We found no need for a uniform national rule and no reason why federal interests should not be treated under the same rules of property that would apply to private persons. In contrast to *Wilson*, however, I agree with the Court that Congress in § 5(a) of the Submerged Lands Act has supplied the rule of decision. Section 5(a) withholds from the grant to the States all accretions to coastal lands acquired or reserved by the United States. I also agree with the Court that California did not acquire the disputed lands pursuant to the "made lands" provisions in § 2(a)(3).

Consequently, the Court's discussion regarding the continuing vitality of *Hughes* v. *Washington*, 389 U. S. 290 (1967), is dicta. *Hughes* is unnecessary to the resolution of choice-of-law issues in title disputes between the Federal Government and a State or private person. Reliance on *Hughes* would be necessary only if we were to hold that federal common law, rather than state law, applied in a title dispute between a federal patentee and a State or private persons as to lands fronting an ocean. The instant case does not present that issue. It is difficult to reconcile *Hughes* with *Corvallis* and we should postpone that endeavor until required to undertake it.

In summary, I think this case can be easily resolved as a title dispute between the United States and California concerning the legal effect of movement of the Pacific Ocean's high-water mark. *Wilson* and the Submerged Lands Act resolve the dispute. The continuing vitality of *Hughes* should be left to another day.

MILLS ET AL. *v.* ROGERS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80–1417. Argued January 13, 1982—Decided June 18, 1982

Respondents, present or former mental patients at a Massachusetts state hospital, instituted a class action against petitioner officials and staff of the hospital in Federal District Court, alleging that forcible administration of antipsychotic drugs to patients violated rights protected by the Federal Constitution. The court held that mental patients enjoy constitutionally protected liberty and privacy interests in deciding for themselves whether to submit to drug therapy; that under state law an involuntary commitment provides no basis for an inference of legal "incompetency" to make such decision; and that without consent either by the patient or the guardian of a patient who has been adjudicated incompetent, the patient's liberty interests may be overridden only in an emergency. The Court of Appeals affirmed in part and reversed in part. It agreed with the District Court's first two holdings above, but reached different conclusions as to the circumstances under which state interests might override the patient's liberty interests. The Court of Appeals reserved to the District Court, on remand, the task of developing mechanisms to ensure adequate procedural protection of the patient's interests. This Court granted certiorari to determine whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs. Shortly thereafter the Massachusetts Supreme Judicial Court ruled on the rights—under both Massachusetts common law and the Federal Constitution—of a *noninstitutionalized* incompetent mental patient as to involuntary treatment with antipsychotic drugs.

Held: The Court of Appeals' judgment is vacated, and the case is remanded for that court's consideration, in the first instance, of whether the correct disposition of this case is affected by the Massachusetts Supreme Judicial Court's intervening decision. Pp. 298–306.

(a) Assuming (as the parties agree) that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs, a substantive issue remains as to the definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. There is also a procedural issue concerning the minimum procedures required by the Con-

stitution for determining that an individual's liberty interest actually is outweighed in a particular instance. As a practical matter both issues are intertwined with questions of state law, which may create liberty interests and procedural protections broader than those protected by the Federal Constitution. If so, the minimal requirements of the Federal Constitution would not be controlling, and would not need to be identified in order to determine the legal rights and duties of persons within the State. Pp. 298–300.

(b) While the record is unclear as to respondents' position in the District Court concerning the effect of state law on their asserted federal rights, in their brief in this Court they clearly assert state-law arguments as alternative grounds for affirming both the "substantive" and "procedural" decisions of the Court of Appeals. In applying the policy of avoiding unnecessary decisions of constitutional issues, it is not clear which, if any, constitutional issues now must be decided to resolve the controversy between the parties. Because of its greater familiarity both with the record and with Massachusetts law, the Court of Appeals is better situated than this Court to determine how the intervening state-court decision may have changed the law of Massachusetts and how any changes may affect this case. Pp. 304–306.

634 F. 2d 650, vacated and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Stephen Schultz argued the cause for petitioners. With him on the briefs was *Francis X. Bellotti*, Attorney General of Massachusetts.

Richard Cole argued the cause for respondents. With him on the brief was *Robert Burdick*.*

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*Briefs of *amici curiae* urging reversal were filed by *Paul L. Perito* and *C. Frederick Ryland* for the American College of Neuropsychopharmacology; by *Joel I. Klein* and *H. Bartow Farr III* for the American Psychiatric Association; and by *Robert H. Weber* and *Jonathan Brant* for the Mental Health Legal Advisors Committee.

Briefs of *amici curiae* urging affirmance were filed by *Joseph R. Tafelski* for Advocates for Basic Legal Equality, Inc.; by *Paul R. Friedman*, *Jane Bloom Yohalem*, *John Townsend Rich*, and *Donald N. Bersoff* for the American Psychological Association et al.; and by *William Alsup* for Barbara Jamison et al.

Louis M. Aucoin III filed a brief for Patients' Rights Advocacy Services, Inc., as *amicus curiae*.

JUSTICE POWELL delivered the opinion of the Court.

The Court granted certiorari in this case to determine whether involuntarily committed mental patients have a constitutional right to refuse treatment with antipsychotic drugs.

I

This litigation began on April 27, 1975, when respondent Rubie Rogers and six other persons filed suit against various officials and staff of the May and Austin Units of the Boston State Hospital. The plaintiffs all were present or former mental patients at the institution. During their period of institutionalization all had been forced to accept unwanted treatment with antipsychotic drugs.[1] Alleging that forcible

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[1] As used in this litigation, the term "antipsychotic drugs" refers to medications such as Thorazine, Mellaril, Prolixin, and Haldol that are used in treating psychoses, especially schizophrenia. See *Rogers* v. *Okin*, 478 F. Supp. 1342, 1359–1360 (Mass. 1979), aff'd in part and rev'd in part, 634 F. 2d 650, 653 (CA1 1980). Sometimes called "major tranquilizers," these compounds were introduced into psychiatry in the early 1950's. See Cole & Davis, Antipsychotic Drugs, in 2 A. Freedman, H. Kaplan, & B. Sadock, Comprehensive Textbook of Psychiatry II, pp. 1921–1922 (2d ed. 1975). It is not disputed that such drugs are "mind-altering." Their effectiveness resides in their capacity to achieve such effects. Citing authorities, petitioners assert that such drugs are essential not only to the treatment of individual disorders, but also to the preservation of institutional order generally needed for effective therapy. See Brief for Petitioners 17–41, 54–100. Respondents dispute this claim, also with support from medical authorities. Respondents also emphasize that antipsychotic drugs carry a significant risk of adverse side effects. These include such neurological syndromes as parkinsonisms, characterized by a mask-like face, retarded volitional movements, and tremors; akathisia, a clinical term for restlessness; dystonic reactions, including grimacing and muscle spasms; and tardive dyskinesia, a disease characterized in its mild form by involuntary muscle movements, especially around the mouth. Tardive dyskinesia can be even more disabling in its most severe forms. See *Rogers* v. *Okin*, 478 F. Supp., at 1360; Byck, Drugs and the Treatment of Psychiatric Disorders, in L. Goodman & A. Gilman, The Pharmalogical Basis of Therapeutics 152, 169 (5th ed. 1975).

administration of these drugs violated rights protected by the Constitution of the United States, the plaintiffs—respondents here—sought compensatory and punitive damages and injunctive relief.[2]

The District Court certified the case as a class action. See *Rogers* v. *Okin*, 478 F. Supp. 1342, 1352, n. 1 (Mass. 1979). Although denying relief in damages, the court held that mental patients enjoy constitutionally protected liberty and privacy interests in deciding for themselves whether to submit to drug therapy.[3] The District Court found that an involuntary "commitment" provides no basis for an inference of legal "incompetency" to make this decision under Massachusetts law. *Id.*, at 1361–1362.[4] Until a judicial finding of

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[2] The respondents also presented constitutional and statutory challenges to a hospital policy of secluding patients against their will. 478 F. Supp., at 1352. Their complaint additionally asserted claims for damages under state tort law. *Id.*, at 1352, 1383. The District Court held that state law prevented seclusion except where necessary to prevent violence. See *id.*, at 1371, 1374. Neither this decision, nor the denial of relief on the damages claims, is in issue before this Court.

[3] The District Court characterized liberty to make "the intimate decision as to whether to accept or refuse [antipsychotic] medication" as "basic to any right of privacy" and therefore protected by the Constitution. See *id.*, at 1366. The court did not derive this right from any particular constitutional provision, although it did observe that the "concept of a right of privacy . . . embodies First Amendment concerns." *Ibid.* In relying on the First Amendment the court reasoned that "the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection." *Id.*, at 1367.

[4] Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician. See, *e. g.*, *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 738–739, 370 N. E. 2d 417, 424 (1977); W. Prosser, Law of Torts § 18 (4th ed. 1971). In this case the petitioners had argued—as they continue to argue—that the judicial commitment proceedings conducted under Massachusetts law, Mass. Gen. Laws Ann., ch. 123 (West Supp. 1982–1983), provide a determination of incompetency sufficient to warrant the State in providing treatment over the objections of the patient. In rejecting this argument

incompetency has been made, the court concluded, the wishes of the patients generally must be respected. *Id.*, at 1365–1368. Even when a state court has rendered a determination of incompetency, the District Court found that the patient's right to make treatment decisions is not forfeited, but must be exercised on his behalf by a court-appointed guardian. *Id.*, at 1364. Without consent either by the patient or his guardian, the court held, the patient's liberty interests may be overridden only in an emergency.[5]

The Court of Appeals for the First Circuit affirmed in part and reversed in part. *Rogers* v. *Okin*, 634 F. 2d 650 (1980). It agreed that mental patients have a constitutionally protected interest in deciding for themselves whether to undergo treatment with antipsychotic drugs. *Id.*, at 653.[6] It

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as a matter of state law, the District Court relied principally on the language of the relevant Massachusetts statutes and on the regulations of the Department of Mental Health. See 478 F. Supp., at 1359, 1361 (citing Department of Mental Health Regulation § 221.02 ("No person shall be deprived of the right to manage his affairs . . . solely by reason of his admission or commitment to a facility except where there has been an adjudication that such person is incompetent"), and Mass. Gen. Laws Ann., ch. 123, § 25 (West Supp. 1982–1983) ("No person shall be deemed to be incompetent to manage his affairs . . . solely by reason of his admission or commitment in any capacity . . ."). The court also appears to have engaged in independent factfinding leading to the same conclusion: "The weight of the evidence persuades this court that, although committed mental patients do suffer at least some impairment of their relationship to reality, most are able to appreciate the benefits, risks, and discomfort that may reasonably be expected from receiving psychotropic medication." 478 F. Supp., at 1361.

[5] The District Court defined an emergency as a situation in which failure to medicate "would result in a substantial likelihood of physical harm to th[e] patient, other patients, or to staff members of the institution." *Id.*, at 1365.

[6] The Court of Appeals termed it "intuitively obvious" that "a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." 634 F. 2d, at 653. Although the Court of Appeals found that the "precise textual source in the Constitution for the protection of this inter-

also accepted the trial court's conclusion that Massachusetts law recognizes involuntarily committed persons as presumptively competent to assert this interest on their own behalf. See *id.*, at 657–659. The Court of Appeals reached different conclusions, however, as to the circumstances under which state interests might override the liberty interests of the patient.

The Court of Appeals found that the State has two interests that must be weighed against the liberty interests asserted by the patient: a police power interest in maintaining order within the institution and in preventing violence, see *id.*, at 655, and a *parens patriae* interest in alleviating the sufferings of mental illness and in providing effective treatment, see *id.*, at 657. The court held that the State, under its police powers, may administer medication forcibly only upon a determination that "the need to prevent violence in a particular situation outweighs the possibility of harm to the medicated individual" and that "reasonable alternatives to the administration of antipsychotics [have been] ruled out." *Id.*, at 656. Criticizing the District Court for imposing what it regarded as a more rigid standard, the Court of Appeals held that a hospital's professional staff must have substantial discretion in deciding when an impending emergency requires involuntary medication.[7] The Court of Appeals reserved to the District Court, on remand, the task of developing mechanisms to ensure that staff decisions under the

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est is unclear," *ibid.*, it concluded that "a source in the Due Process Clause of the Fourteenth Amendment for the protection of this interest exists, most likely as part of the penumbral right to privacy, bodily integrity, or personal security." *Ibid.* The Court of Appeals found it unnecessary to examine the conclusion of the District Court that First Amendment interests also were implicated.

[7] The Court of Appeals held that the District Court had erred in requiring what it construed as an overly simplistic mathematical calculation of the "quantitative" likelihood of harm. See *id.*, at 656.

"police power" standard accord adequate procedural protection to "the interests of the patients."[8]

With respect to the State's *parens patriae* powers, the Court of Appeals accepted the District Court's state-law distinction between patients who have and patients who have not been adjudicated incompetent. Where a patient has not been found judicially to be "incompetent" to make treatment decisions under Massachusetts law,[9] the court ruled that the *parens patriae* interest will justify involuntary medication only when necessary to prevent further deterioration in the patient's mental health. See *id.*, at 660. The Court of Appeals reversed the District Court's conclusion that a guardian must be appointed to make nonemergency treatment decisions on behalf of incompetent patients. Even for incompetent patients, however, it ruled that the State's *parens patriae* interest would justify prescription only of such treatment as would be accepted voluntarily by "the individual himself . . . were he competent" to decide. *Id.*, at 661.[10]

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[8] It asserted, apparently as a minimum, that "the determination that medication is necessary must be made by a qualified physician as to each individual patient to be medicated." *Ibid.*

[9] A number of other States also distinguish between the standards governing involuntary commitment and those applying to determinations of incompetency to make treatment decisions. For a survey as of December 1, 1977, see Plotkin, Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment, 72 Nw. U. L. Rev. 461, 504–525 (1977). The Court of Appeals for the Second Circuit has held that civil commitment does not raise even a presumption of incompetence. See *Winters* v. *Miller*, 446 F. 2d 65 (1971).

[10] In imposing this "substituted judgment" standard the Court of Appeals appears to have viewed its holding as mandated by the Federal Constitution. See 634 F. 2d, at 661 ("In so holding, we do not imply that the Constitution . . ."). But it followed its ultimate substantive conclusion with a citation to a Massachusetts case: *"Cf. Superintendent of Belchertown* v. *Saikewicz,"* 373 Mass. 728, 370 N. E. 2d 417 (1977). *Saikewicz* held that a court must apply the "substituted judgment" standard in determining whether to approve painful medical treatment for a profoundly retarded

The Court of Appeals held that the patient's interest in avoiding undesired drug treatment generally must be protected procedurally by a judicial determination of "incompetency."[11] If such a determination were made, further on-the-scene procedures still would be required before antipsychotic drugs could be administered forcibly in a particular instance. *Ibid.*[12]

Because the judgment of the Court of Appeals involved constitutional issues of potentially broad significance,[13] we granted certiorari. *Okin* v. *Rogers*, 451 U. S. 906 (1981).

II

A

The principal question on which we granted certiorari is whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic

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man incapable of giving informed consent. In *Saikewicz* the Massachusetts Supreme Judicial Court appears to have relied on both the Federal Constitution and the law of Massachusetts to support its decision. See *id.*, at 738–741, 370 N. E. 2d, at 424–425. But the Massachusetts court characterized its analysis as having identified a "constitutional right of privacy," *id.*, at 739, 370 N. E. 2d, at 424, thus creating some doubt as to the extent that the decision had an independent state-law basis.

[11] The Court of Appeals appears to have agreed with the District Court that this determination, under Massachusetts law, would require a decision by the probate court under Mass. Gen. Laws Ann., ch. 123, § 25 (West Supp. 1982–1983); see ch. 201, §§ 1, 6, 12 (West Supp. 1982–1983) (appointment and powers of guardians). It suggested, however, that nonjudicial procedures would satisfy the federal constitutional requirements of due process. See 634 F. 2d, at 659–660.

[12] The Court of Appeals again instructed the District Court to develop procedural safeguards adequate to protect the patient's substantive interests. See *id.*, at 661.

[13] Constitutional questions involving the rights of committed mental patients to refuse antipsychotic drugs have been presented in other recent cases, including *Rennie* v. *Klein*, 653 F. 2d 836 (CA3 1981), and *Davis* v. *Hubbard*, 506 F. Supp. 915 (ND Ohio 1980). On the issues raised, see generally Plotkin, *supra;* Shapiro, Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies, 47 S. Cal. L. Rev. 237 (1974).

drugs.[14] This question has both substantive and procedural aspects. See 634 F. 2d, at 656, 661; *Rennie* v. *Klein*, 653 F. 2d 836, 841 (CA3 1981). The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs.[15] Assuming that they are correct in this respect, the substantive issue involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. See *Youngberg* v. *Romeo*, *post*, at 319–320; *Bell* v. *Wolfish*, 441 U. S. 520, 560 (1979); *Roe* v. *Wade*, 410 U. S. 113, 147–154 (1973); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25–27 (1905). The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance. See *Parham* v. *J. R.*, 442 U. S. 584, 606 (1979); *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

As a practical matter both the substantive and procedural issues are intertwined with questions of state law. In theory a court might be able to define the scope of a patient's federally protected liberty interest without reference to state law.[16] Having done so, it then might proceed to adjudicate the procedural protection required by the Due Process Clause for the federal interest alone. Cf. *Vitek* v. *Jones*, 445

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[14] Pet. for Cert. 1.

[15] In this Court petitioners appear to concede that involuntarily committed mental patients have a constitutional interest in freedom from bodily invasion, see Brief for Petitioners 43–47, but they deny that this interest is "fundamental." They also assert that it is outweighed in an appropriate balancing test by compelling state interests in administering antipsychotic drugs. *Id.*, at 54–68.

[16] As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution, cf. *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only "assuming" the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests.

U. S. 480, 491–494 (1980). For purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. See *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 7, 12 (1979); *Oregon* v. *Hass*, 420 U. S. 714, 719 (1975); see also Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). If so, the broader state protections would define the actual substantive rights possessed by a person living within that State.

Where a State creates liberty interests broader than those protected directly by the Federal Constitution, the procedures mandated to protect the federal substantive interests also might fail to determine the actual procedural rights and duties of persons within the State. Because state-created liberty interests are entitled to the protection of the federal Due Process Clause, see, *e. g.*, *Vitek* v. *Jones*, *supra*, at 488; *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, at 7, the full scope of a patient's due process rights may depend in part on the substantive liberty interests created by state as well as federal law. Moreover, a State may confer *procedural* protections of liberty interests that extend beyond those minimally required by the Constitution of the United States. If a State does so, the minimal requirements of the Federal Constitution would not be controlling, and would not need to be identified in order to determine the legal rights and duties of persons within that State.

B

Roughly five months after the Court of Appeals decided this case, and shortly after this Court granted certiorari, the Supreme Judicial Court of Massachusetts announced its deci-

sion in *Guardianship of Roe*, 383 Mass. 415, 421 N. E. 2d 40 (1981) *(Roe)*. *Roe* involved the right of a noninstitutionalized but mentally incompetent person to refuse treatment with antipsychotic drugs. Expressly resting its decision on the common law of Massachusetts as well as on the Federal Constitution,[17] Massachusetts' highest court held in *Roe* that a person has a protected liberty interest in "'decid[ing] for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs.'" *Id.*, at 433, n. 9, 421 N. E. 2d, at 51, n. 9.[18] The court found—again apparently on the basis of the common law of Massachusetts as well as the Constitution of the United States—that this interest of the individual is of such importance that it can be overcome only by "an overwhelming State interest." *Id.*, at 434, 421 N. E. 2d, at 51. *Roe* further held that a person does not forfeit his protected liberty interest by virtue of becoming incompetent, but rather remains entitled to have his "substituted judgment" exercised on his behalf. *Ibid.* Defining this "substituted judgment" as one for which "[n]o medical expertise is required," *id.*, at 435, 421 N. E. 2d, at 52, the Massachusetts Supreme Judicial Court required a *judicial* determination of substituted judgment before drugs

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[17] See 383 Mass., at 417, and n. 1, 433, n. 9, 421 N. E. 2d, at 42, and n. 1, 51, n. 9.

[18] Although the Massachusetts court quoted this formulation from the decision of the Court of Appeals in *Rogers* v. *Okin*, 634 F. 2d, at 653, the quotation is used to define the right, rather than to identify its legal source. *Roe* noted that *Rogers* v. *Okin* found the source of this right in the Due Process Clause of the Fourteenth Amendment. The court continued its discussion by stating its reliance on three bases, two of them not cited in *Rogers* v. *Okin:* the "inherent power of the court to prevent mistakes or abuses by guardians, whose authority comes from the Commonwealth," and the "common law" right of persons to decide what will be done with their bodies. 383 Mass., at 433, n. 9, 421 N. E. 2d, at 51, n. 9.

could be administered in a particular instance,[19] except possibly in cases of medical emergency.[20]

C

The Massachusetts Supreme Court stated that its decision was limited to cases involving *noninstitutionalized* mental patients. See *id.*, at 417, 441, 452–453, 421 N. E. 2d, at 42, 55, 61–62.[21] Nonetheless, respondents have argued in

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[19] See *id.*, at 435, 421 N. E. 2d, at 52:

"The determination of what the incompetent individual would do if competent will probe the incompetent individual's values and preferences, and such an inquiry, in a case involving antipsychotic drugs [and a noninstitutionalized but incompetent patient], is best made in courts of competent jurisdiction."

Having held that a "ward possesses but is incapable of exercising personally" the right to refuse antipsychotic drugs, the Massachusetts Supreme Court viewed the "primary dispute" as over "who ought to exercise this right on behalf of the ward." *Id.*, at 433, 421 N. E. 2d, at 51. The Supreme Judicial Court in *Roe* identified six "relevant" but "not exclusive" factors that should guide the decisions of the lower courts: "(1) the ward's expressed preferences regarding treatment; (2) his religious beliefs; (3) the impact upon the ward's family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment." *Id.*, at 444, 421 N. E. 2d, at 57. It emphasized that the determination "must 'give the fullest possible expression to the character and circumstances'" of the individual patient and that "this is a subjective rather than an objective determination." *Id.*, at 444, 421 N. E. 2d, at 56 (citation and footnote omitted).

[20] See *id.*, at 440–441, 421 N. E. 2d, at 54–55.

[21] But cf. *id.*, at 432, 421 N. E. 2d, at 50 ("because of the likelihood of . . . the necessity of making similar determinations in other cases, we establish guidelines regarding the criteria to be used and the procedures to be followed in making a substituted judgment determination"), and *id.*, at 453–454, 421 N. E. 2d, at 62 ("We do not mean to imply that these [involuntarily committed] patients' rights are wholly unprotected or that their circumstances are entirely dissimilar to those we have discussed. We do suggest, however, that it would be imprudent to establish prematurely the relative importance of adverse interests . . .").

this Court that *Roe* may influence the correct disposition of the case at hand.[22] We agree.

Especially in the wake of *Roe*, it is distinctly possible that Massachusetts recognizes liberty interests of persons adjudged incompetent that are broader than those protected directly by the Constitution of the United States. Compare *Roe*, *supra*, at 434, 421 N. E. 2d, at 51 (protected liberty interest in avoiding unwanted treatment continues even when a person becomes incompetent and creates a right of incompetents to have their "substituted judgment" determined), with *Addington* v. *Texas*, 441 U. S. 418, 429–430 (1979) (because a person "who is suffering from a debilitating mental illness" is not "wholly at liberty," and because the complexities of psychiatric diagnosis "render certainties virtually beyond reach," "practical considerations" may require "a compromise between what it is possible to prove and what protects the rights of the individual"). If the state interest is broader, the *substantive* protection that the Constitution affords against the involuntary administration of antipsychotic drugs would not determine the actual substantive rights and duties of persons in the State of Massachusetts.

Procedurally, it also is quite possible that a Massachusetts court, as a matter of state law, would require greater protection of relevant liberty interests than the minimum adequate to survive scrutiny under the Due Process Clause. Compare *Roe*, *supra*, at 434, 421 N. E. 2d, at 51 ("We have . . . stated our preference for judicial resolution of certain legal issues arising from proposed extraordinary medical treatment . . ."), with *Youngberg* v. *Romeo*, *post*, at 322–323 ("[T]here certainly is no reason to think judges or juries are better

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[22] Respondents first presented this argument in a motion to dismiss or in the alternative to certify certain questions to the Supreme Judicial Court of Massachusetts, filed in this Court on October 1, 1981. In their brief on the merits, respondents argue that *Roe* provides an alternative basis on which this Court could affirm the judgment of the Court of Appeals.

qualified than appropriate professionals in making [treatment] decisions"), and with *Parham* v. *J. R.*, 442 U. S., at 608, n. 16 (Courts must not "unduly burde[n] the legitimate efforts of the states to deal with difficult social problems. The judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise").[23] Again on this hypothesis state law would be dispositive of the procedural rights and duties of the parties to this case.

Finally, even if state procedural law itself remains unchanged by *Roe*, the federally mandated procedures will depend on the nature and weight of the *state* interests, as well as the individual interests, that are asserted. To identify the nature and scope of state interests that are to be balanced against an individual's liberty interests, this Court may look to state law. See, *e. g.*, *Roe* v. *Wade*, 410 U. S., at 148, and n. 42, 151, and nn. 48–50; *Ingraham* v. *Wright*, 430 U. S. 651, 661–663 (1977). Here we view the underlying state-law predicate for weighing asserted state interests as being put into doubt, if not altered, by *Roe*.[24]

D

It is unclear on the record presented whether respondents, in the District Court, did or did not argue the existence of "substantive" state-law liberty interests as a basis for their

[23] Even prior to *Roe*, the Court of Appeals concluded that Massachusetts state law, which it construed as requiring *judicial* determinations of incompetency separate from involuntary commitment proceedings, see 634 F. 2d, at 658–659, "in many respects . . . goes well beyond the minimum requirements mandated by the Fourteenth Amendment," *id.*, at 659 (footnote omitted). *Roe* now has taken the further step of requiring *judicial* procedure in every instance in which a guardian believes drug therapy necessary for a noninstitutionalized incompetent.

[24] In *Roe* the Massachusetts court explicitly considered the implicated state interests, see 383 Mass., at 449, 421 N. E. 2d, at 59, and concluded that the trial judge had erred in finding that the State had a "vital" *parens patriae* interest in "seeing that its residents function at the maximum level of their capacity," *ibid.* The Court of Appeals in this case had found and weighed a *parens patriae* interest. 634 F. 2d, at 657–661.

claim to procedural protection under the federal Due Process Clause, or whether they may have claimed state-law procedural protections for substantive federal interests.[25] In their brief in this Court, however, respondents clearly assert state-law arguments as alternative grounds for affirming both the "substantive" and "procedural" decisions of the Court of Appeals. See Brief for Respondents, especially at 61, 71–72, 92–95.

Until certain questions have been answered, we think it would be inappropriate for us to attempt to weigh or even to identify relevant liberty interests that might be derived directly from the Constitution, independently of state law. It is this Court's settled policy to avoid unnecessary decisions of constitutional issues. See, *e. g.*, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 294 (1982); *New York Transit Authority* v. *Beazer*, 440 U. S. 568, 582–583, n. 22 (1979); *Poe* v. *Ullman*, 367 U. S. 497, 502–509 (1961); *Ashwander* v. *TVA*, 297 U. S. 288, 341, 347–348 (1936) (Brandeis, J., concurring). This policy is supported, although not always required, by the prohibition against advisory opinions. Cf. *United States* v. *Hastings*, 296 U. S. 188, 193 (1935) (review of one basis for a decision supported by another basis not subject to examination would represent "an expression of an abstract opinion").

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[25] Although relying primarily on federal constitutional grounds, the respondents' original complaint in the District Court could be construed as raising state-law guarantees either as alternative or as interrelated bases for relief. See Complaint in No. 75–1610–T (D. Mass.) (filed Apr. 27, 1975). In their briefs in the Court of Appeals, respondents relied unambiguously on state law in support of both the "substantive" and "procedural" rights that they now claim in this Court. See Brief for Plaintiff-Appellants in No. 79–1649, p. 44 ("Massachusetts law created a legal entitlement to be free from forced medications except in emergencies . . ."); Brief for Plaintiff-Appellees in No. 79–1648, p. 54 ("[T]he lower court's requirement that a guardian must decide whether an incompetent patient will receive psychotropic medication in a non-emergency was the correct application of state law and was not based upon constitutional authority") (emphasis omitted).

In applying this policy of restraint, we are uncertain here which if any constitutional issues now must be decided to resolve the controversy between the parties. In the wake of *Roe*, we cannot say with confidence that adjudication based solely on identification of federal constitutional interests would determine the actual rights and duties of the parties before us. And, as an additional cause for hesitation, our reading of the opinion of the Court of Appeals has left us in doubt as to the extent to which state issues were argued below and the degree to which the court's holdings may rest on subsequently altered state-law foundations.

Because of its greater familiarity both with the record and with Massachusetts law, the Court of Appeals is better situated than we to determine how *Roe* may have changed the law of Massachusetts and how any changes may affect this case. Accordingly, we think it appropriate for the Court of Appeals to determine in the first instance whether *Roe* requires revision of its holdings or whether it may call for the certification of potentially dispositive state-law questions to the Supreme Judicial Court of Massachusetts, see *Bellotti* v. *Baird*, 428 U. S. 132, 150–151 (1976).[25] The Court of Appeals also may consider whether this is a case in which abstention now is appropriate. See generally *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 813–819 (1976).

The judgment of the Court of Appeals is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[25] A certification procedure is provided by Mass. Rules of Court, Sup. Jud. Ct. Rule 1:03.

YOUNGBERG, SUPERINTENDENT, PENNHURST STATE SCHOOL AND HOSPITAL, ET AL. *v.* ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, ROMEO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80–1429. Argued January 11, 1982—Decided June 18, 1982

Respondent, who is mentally retarded, was involuntarily committed to a Pennsylvania state institution. Subsequently, after becoming concerned about injuries which respondent had suffered at the institution, his mother filed an action as his next friend in Federal District Court for damages under 42 U. S. C. § 1983 against petitioner institution officials. She claimed that respondent had constitutional rights to safe conditions of confinement, freedom from bodily restraint, and training or "habilitation" and that petitioners knew, or should have known, about his injuries but failed to take appropriate preventive procedures, thus violating his rights under the Eighth and Fourteenth Amendments. In the ensuing jury trial, the District Court instructed the jury on the assumption that the Eighth Amendment was the proper standard of liability, and a verdict was returned for petitioners, on which judgment was entered. The Court of Appeals reversed and remanded for a new trial, holding that the Fourteenth, rather than the Eighth, Amendment provided the proper constitutional basis for the asserted rights.

Held: Respondent has constitutionally protected liberty interests under the Due Process Clause of the Fourteenth Amendment to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably may be required by these interests. Whether respondent's constitutional rights have been violated must be determined by balancing these liberty interests against the relevant state interests. The proper standard for determining whether the State has adequately protected such rights is whether professional judgment in fact was exercised. And in determining what is "reasonable," courts must show deference to the judgment exercised by a qualified professional, whose decision is presumptively valid. Pp. 314–325.

644 F. 2d 147, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BRENNAN and O'CONNOR, JJ., joined, *post*, p. 325. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 329.

David H. Allshouse, Deputy Attorney General of Pennsylvania, argued the cause for petitioners. With him on the briefs were *Leroy S. Zimmerman*, Attorney General, and *Robert B. Hoffman* and *Allen C. Warshaw*, Deputy Attorneys General.

Edmond A. Tiryak argued the cause for respondent. With him on the brief were *Ralph J. Moore, Jr.*, and *William F. Sheehan.**

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*A brief for the State of Connecticut et al. as *amici curiae* urging reversal was filed by *Carl R. Ajello*, Attorney General of Connecticut, and *Hugh Barber*, *Richard T. Couture*, and *Francis J. Mac Gregor*, Assistant Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, and *R. Emmett Poundstone III*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Assistant Attorney General, *Steve Clark*, Attorney General of Arkansas, and *Robert R. Ross*, Deputy Attorney General, *Jim Smith*, Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Frank J. Kelley*, Attorney General of Michigan, *Paul L. Douglas*, Attorney General of Nebraska, *Gregory H. Smith*, Attorney General of New Hampshire, *James R. Zazzali*, Attorney General of New Jersey, *Robert O. Wefald*, Attorney General of North Dakota, *William J. Brown*, Attorney General of Ohio, *David B. Frohnmayer*, Attorney General of Oregon, *Dennis J. Roberts II*, Attorney General of Rhode Island, *Daniel R. McLeod*, Attorney General of South Carolina, *Marshall Coleman*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Chauncey H. Browning, Jr.*, Attorney General of West Virginia.

Briefs of *amici curiae* urging affirmance were filed by *Margaret F. Ewing*, *Paul R. Friedman*, and *Jane Bloom Yohalem* for the American Orthopsychiatric Association et al.; and by *Dan Stormer* and *Mary Burdick* for Mental Health Advocacy Services et al.

H. Bartow Farr III filed a brief for the American Psychiatric Association as *amicus curiae*.

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether respondent, involuntarily committed to a state institution for the mentally retarded, has substantive rights under the Due Process Clause of the Fourteenth Amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or "habilitation."[1] Respondent sued under 42 U. S. C. § 1983 three administrators of the institution, claiming damages for the alleged breach of his constitutional rights.

I

Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an 18-month-old child, with an I. Q. between 8 and 10. He cannot talk and lacks the most basic self-care skills. Until he was 26, respondent lived with his parents in Philadelphia. But after the death of his father in May 1974, his mother was unable to care for him. Within two weeks of the father's death, respondent's mother sought his temporary admission to a nearby Pennsylvania hospital.

Shortly thereafter, she asked the Philadelphia County Court of Common Pleas to admit Romeo to a state facility on a permanent basis. Her petition to the court explained that she was unable to care for Romeo or control his violence.[2] As part of the commitment process, Romeo was examined by a physician and a psychologist. They both certified that re-

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[1] The American Psychiatric Association explains: "The word 'habilitation,' . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. [T]he principal focus of habilitation is upon training and development of needed skills." Brief for American Psychiatric Association as *Amicus Curiae* 4, n. 1.

[2] Mrs. Romeo's petition to the Court of Common Pleas stated: "Since my husband's death I am unable to handle him. He becomes violent—Kicks, punches, breaks glass; He can't speak—wants to express himself but can't. He is [a] constant 24 hr. care. [W]ithout my husband I am unable to care for him." App. 18a.

spondent was severely retarded and unable to care for himself. App. 21a–22a and 28a–29a. On June 11, 1974, the Court of Common Pleas committed respondent to the Pennhurst State School and Hospital, pursuant to the applicable involuntary commitment provision of the Pennsylvania Mental Health and Mental Retardation Act, Pa. Stat. Ann., Tit. 50, § 4406(b) (Purdon 1969).

At Pennhurst, Romeo was injured on numerous occasions, both by his own violence and by the reactions of other residents to him. Respondent's mother became concerned about these injuries. After objecting to respondent's treatment several times, she filed this complaint on November 4, 1976, in the United States District Court for the Eastern District of Pennsylvania as his next friend. The complaint alleged that "[d]uring the period July, 1974 to the present, plaintiff has suffered injuries on at least sixty-three occasions." The complaint originally sought damages and injunctive relief from Pennhurst's director and two supervisors;[3] it alleged that these officials knew, or should have known, that Romeo was suffering injuries and that they failed to institute appropriate preventive procedures, thus violating his rights under the Eighth and Fourteenth Amendments.

Thereafter, in late 1976, Romeo was transferred from his ward to the hospital for treatment of a broken arm. While in the infirmary, and by order of a doctor, he was physically restrained during portions of each day.[4] These restraints were ordered by Dr. Gabroy, not a defendant here, to protect

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[3] Petitioner Duane Youngberg was the Superintendent of Pennhurst; he had supervisory authority over the entire facility. Petitioner Richard Matthews was the Director of Resident Life at Pennhurst. Petitioner Marguerite Conley was Unit Director for the unit in which respondent lived. According to respondent, petitioners are administrators, not medical doctors. See Brief for Respondent 2. Youngberg and Matthews are no longer at Pennhurst.

[4] Although the Court of Appeals described these restraints as "shackles," "soft" restraints, for the arms only, were generally used. 7 Tr. 53–55.

Romeo and others in the hospital, some of whom were in traction or were being treated intravenously. 7 Tr. 40, 49, 76–78. Although respondent normally would have returned to his ward when his arm healed, the parties to this litigation agreed that he should remain in the hospital due to the pending lawsuit. 5 *id.*, at 248; 6 *id.*, at 57–58 and 137. Nevertheless, in December 1977, a second amended complaint was filed alleging that the defendants were restraining respondent for prolonged periods on a routine basis. The second amended complaint also added a claim for damages to compensate Romeo for the defendants' failure to provide him with appropriate "treatment or programs for his mental retardation."[5] All claims for injunctive relief were dropped prior to trial because respondent is a member of the class seeking such relief in another action.[6]

An 8-day jury trial was held in April 1978. Petitioners introduced evidence that respondent participated in several programs teaching basic self-care skills.[7] A comprehensive behavior-modification program was designed by staff members to reduce Romeo's aggressive behavior,[8] but that program was never implemented because of his mother's objec-

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[5] Respondent uses "treatment" as synonymous with "habilitation" or "training." See Brief for Respondent 21–23.

[6] *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981) (remanded for further proceedings).

[7] Prior to his transfer to Pennhurst's hospital ward, Romeo participated in programs dealing with feeding, showering, drying, dressing, self-control, and toilet training, as well as a program providing interaction with staff members. Defendants' Exhibit 10; 3 Tr. 69–70; 5 *id.*, at 44–56, 242–250; 6 *id.*, at 162–166; 7 *id.*, at 41–48.

Some programs continued while respondent was in the hospital, 5 *id.*, at 227, 248, 256; 6 *id.*, at 50, 162–166; 6 *id.*, at 32, 34, 41–48, and they reduced respondent's aggressive behavior to some extent, 7 *id.*, at 45.

[8] 2 *id.*, at 7; 5 *id.*, at 88–90; 6 *id.*, at 88, 200–203; Defendants' Exhibit 1, p. 9. The program called for short periods of separation from other residents and for use of "muffs" on plaintiff's hands for short periods of time, *i. e.*, five minutes, to prevent him from harming himself or others.

tions.[9] Respondent introduced evidence of his injuries and of conditions in his unit.[10]

At the close of the trial, the court instructed the jury that "if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo," such failure deprived him of constitutional rights. App. 73a. The jury also was instructed that if the defendants shackled Romeo or denied him treatment "as a punishment for filing this lawsuit," his constitutional rights were violated under the Eighth Amendment. *Id.*, at 73a–75a. Finally, the jury was instructed that only if they found the defendants "deliberate[ly] indifferen[t] to the serious medical [and psychological] needs" of Romeo could they find that his Eighth and Fourteenth Amendment rights had been violated. *Id.*, at 74a–75a.[11] The jury returned a verdict for the defendants, on which judgment was entered.

The Court of Appeals for the Third Circuit, sitting en banc, reversed and remanded for a new trial. 644 F. 2d 147 (1980). The court held that the Eighth Amendment, prohibiting cruel and unusual punishment of those convicted of crimes, was not an appropriate source for determining the rights of the involuntarily committed. Rather, the Fourteenth Amendment and the liberty interest protected by that Amendment provided the proper constitutional basis for these rights. In ap-

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[9] 1 Tr. 53; 4 *id.*, at 25; 6 *id.*, at 204.

[10] The District Judge refused to allow testimony by two of Romeo's witnesses—trained professionals—indicating that Romeo would have benefited from more or different training programs. The trial judge explained that evidence of the advantages of alternative forms of treatment might be relevant to a malpractice suit, but was not relevant to a constitutional claim under § 1983. App. to Pet. for Cert. 101.

[11] The "deliberate indifference" standard was adopted by this Court in *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976), a case dealing with prisoners' rights to punishment that is not "cruel and unusual" under the Eighth Amendment. Although the District Court did not refer to *Estelle* v. *Gamble* in charging the jury, it erroneously used the deliberate-indifference standard articulated in that case. See App. 45a, 75a.

plying the Fourteenth Amendment, the court found that the involuntarily committed retain liberty interests in freedom of movement and in personal security. These were "fundamental liberties" that can be limited only by an "overriding, non-punitive" state interest. *Id.*, at 157–158 (footnote omitted). It further found that the involuntarily committed have a liberty interest in habilitation designed to "treat" their mental retardation. *Id.*, at 164–170.[12]

The en banc court did not, however, agree on the relevant standard to be used in determining whether Romeo's rights had been violated.[13] Because physical restraint "raises a presumption of a punitive sanction," the majority of the Court of Appeals concluded that it can be justified only by "compelling necessity." *Id.*, at 159–160 (footnote omitted). A somewhat different standard was appropriate for the failure to provide for a resident's safety. The majority considered that such a failure must be justified by a showing of "substantial necessity." *Id.*, at 164. Finally, the majority held that when treatment has been administered, those responsible are liable only if the treatment is not "acceptable in the light of present medical or other scientific knowledge." *Id.*, at 166–167 and 173.[14]

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[12] The Court of Appeals used "habilitation" and "treatment" as synonymous, though it regarded "habilitation" as more accurate in describing treatment needed by the mentally retarded. See 644 F. 2d, at 165, and n. 40.

[13] The existence of a qualified immunity defense was not at issue on appeal. The defendants had received instructions on this defense, App. 76a, and it was not challenged by respondent. 644 F. 2d, at 173, n. 1. After citing *Pierson* v. *Ray*, 386 U. S. 547 (1967), and *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the majority of the Court of Appeals noted that such instructions should be given again on the remand. 644 F. 2d, at 171–172.

[14] Actually, the court divided the right-to-treatment claim into three categories and adopted three standards, but only the standard described in text is at issue before this Court. The Court of Appeals also stated that if a jury finds that *no* treatment has been administered, it may hold the institution's administrators liable unless they can provide a compelling explana-

Chief Judge Seitz, concurring in the judgment, considered the standards articulated by the majority as indistinguishable from those applicable to medical malpractice claims. In Chief Judge Seitz' view, the Constitution "only requires that the courts make certain that professional judgment in fact was exercised." *Id.*, at 178. He concluded that the appropriate standard was whether the defendants' conduct was "such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment." *Ibid.*[15]

We granted the petition for certiorari because of the importance of the question presented to the administration of state institutions for the mentally retarded. 451 U. S. 982 (1981).

II

We consider here for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment to the Constitution.[16] In this

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tion for the lack of treatment, *id.*, at 165, 173, but respondent does not discuss this precise standard in his brief and it does not appear to be relevant to the facts of this case. In addition, the court considered "least intrusive" analysis appropriate to justify severe intrusions on individual dignity, such as permanent physical alteration or surgical intervention, *id.*, at 165–166 and 173, but respondent concedes that this issue is not present in this case.

[15] Judge Aldisert joined Chief Judge Seitz' opinion, but wrote separately to emphasize the nature of the difference between the majority opinion and that of the Chief Judge. On a conceptual level, Judge Aldisert thought that the court erred in abandoning the common-law method of deciding the case at bar rather than articulating broad principles unconnected with the facts of the case and of uncertain meaning. *Id.*, at 182–183. And, on a pragmatic level, Judge Aldisert warned that neither juries nor those administering state institutions would receive guidance from the "amorphous constitutional law tenets" articulated in the majority opinion. *Id.*, at 184. See *id.*, at 183–185.

Judge Garth also joined Chief Judge Seitz' opinion, and wrote separately to criticize the majority for addressing issues not raised by the facts of this case. *Id.*, at 186.

[16] In pertinent part, that Amendment provides that a State cannot de-

case, respondent has been committed under the laws of Pennsylvania, and he does not challenge the commitment. Rather, he argues that he has a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that petitioners infringed these rights by failing to provide constitutionally required conditions of confinement.

The mere fact that Romeo has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment. See, *e. g.*, *Vitek* v. *Jones*, 445 U. S. 480, 491–494 (1980). Indeed, the State concedes that respondent has a right to adequate food, shelter, clothing, and medical care.[17] We must decide whether liberty interests also exist in safety, freedom of movement, and training. If such interests do exist, we must further decide whether they have been infringed in this case.

A

Respondent's first two claims involve liberty interests recognized by prior decisions of this Court, interests that involuntary commitment proceedings do not extinguish.[18] The first is a claim to safe conditions. In the past, this Court has noted that the right to personal security constitutes a "historic liberty interest" protected substantively by the Due Process Clause. *Ingraham* v. *Wright*, 430 U. S. 651, 673 (1977). And that right is not extinguished by lawful confinement, even for penal purposes. See *Hutto* v. *Finney*, 437 U. S. 678 (1978). If it is cruel and unusual punishment to

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prive "any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14, § 1.

Respondent no longer relies on the Eighth Amendment as a direct source of constitutional rights. See Brief for Respondent 13, n. 12.

[17] Brief for Petitioners 8, 11, 12, and n. 10; Brief for Respondent 15–16. See also Brief for State of Connecticut et al. as *Amici Curiae* 8. Petitioners argue that they have fully protected these interests.

[18] Petitioners do not appear to argue to the contrary. See Brief for Petitioners 27–31.

hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.

Next, respondent claims a right to freedom from bodily restraint. In other contexts, the existence of such an interest is clear in the prior decisions of this Court. Indeed, "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 18 (1979) (POWELL, J., concurring in part and dissenting in part). This interest survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment.

B

Respondent's remaining claim is more troubling. In his words, he asserts a "constitutional right to minimally adequate habilitation." Brief for Respondent 8, 23, 45. This is a substantive due process claim that is said to be grounded in the liberty component of the Due Process Clause of the Fourteenth Amendment.[19] The term "habilitation," used in psychiatry, is not defined precisely or consistently in the opinions below or in the briefs of the parties or the *amici*.[20] As

[19] Respondent also argues that because he was committed for care and treatment under state law he has a state substantive right to habilitation, which is entitled to substantive, not procedural, protection under the Due Process Clause of the Fourteenth Amendment. But this argument is made for the first time in respondent's brief to this Court. It was not advanced in the courts below, and was not argued to the Court of Appeals as a ground for reversing the trial court. Given the uncertainty of Pennsylvania law and the lack of any guidance on this issue from the lower federal courts, we decline to consider it now. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 323, n. 1 (1977); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927); *Old Jordan Milling Co.* v. *Société Anonyme des Mines*, 164 U. S. 261, 264–265 (1896).

[20] Professionals in the habilitation of the mentally retarded disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible. See, *e. g.*, Favell, Risley,

noted previously in n. 1, *supra*, the term refers to "training and development of needed skills." Respondent emphasizes that the right he asserts is for "minimal" training, see Brief for Respondent 34, and he would leave the type and extent of training to be determined on a case-by-case basis "in light of present medical or other scientific knowledge," *id.*, at 45.

In addressing the asserted right to training, we start from established principles. As a general matter, a State is under no constitutional duty to provide substantive services for those within its border. See *Harris* v. *McRae*, 448 U. S. 297, 318 (1980) (publicly funded abortions); *Maher* v. *Roe*, 432 U. S. 464, 469 (1977) (medical treatment). When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities. See *Richardson* v. *Belcher*, 404 U. S. 78, 83–84 (1971); *Dandridge* v. *Williams*, 397 U. S. 471, 478 (1970). Nor must a State "choose between attacking every aspect of a problem or not attacking the problem at all." *Id.*, at 486–487.

Respondent, in light of the severe character of his retardation, concedes that no amount of training will make possible his release. And he does not argue that if he were still at home, the State would have an obligation to provide training at its expense. See Tr. of Oral Arg. 33. The record reveals that respondent's primary needs are bodily safety and a minimum of physical restraint, and respondent clearly claims

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Wolfe, Riddle, & Rasmussen, The Limits of Habilitation: How Can We Identify Them and How Can We Change Them?, 1 Analysis and Intervention in Developmental Disabilities 37 (1981); Bailey, Wanted: A Rational Search for the Limiting Conditions of Habilitation in the Retarded, 1 Analysis and Intervention in Developmental Disabilities 45 (1981); Kauffman & Krouse, The Cult of Educability: Searching for the Substance of Things Hoped for; The Evidence of Things Not Seen, 1 Analysis and Intervention in Developmental Disabilities 53 (1981).

training related to these needs.[21] As we have recognized that there is a constitutionally protected liberty interest in safety and freedom from restraint, *supra*, at 315–316, training may be necessary to avoid unconstitutional infringement of those rights. On the basis of the record before us, it is quite uncertain whether respondent seeks any "habilitation" or training unrelated to safety and freedom from bodily restraints. In his brief to this Court, Romeo indicates that even the self-care programs he seeks are needed to reduce his aggressive behavior. See Brief for Respondent 21–22, 50. And in his offer of proof to the trial court, respondent repeatedly indicated that, if allowed to testify, his experts would show that additional training programs, including self-care programs, were needed to reduce his aggressive behavior. App. to Pet. for Cert. 98a–104a.[22] If, as seems the case, respondent seeks only training related to safety and freedom from restraints, this case does not present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, even when no type or amount of training would lead to freedom.[23]

Chief Judge Seitz, in language apparently adopted by respondent, observed:

> "I believe that the plaintiff has a constitutional right to minimally adequate care and treatment. The existence

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[21] See, *e. g.*, description of complaint, *supra*, at 310.

[22] See also Brief for Appellant in No. 78–1982, pp. 11–14, 20–21, and 24 (CA3).

[23] In the trial court, respondent asserted that "state officials at a state mental hospital have a duty to provide residents . . . with such treatment as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit." App. to Pet. for Cert. 94a–95a. But this claim to a sweeping *per se* right was dropped thereafter. In his brief to this Court, respondent does not repeat it and, at oral argument, respondent's counsel explicitly disavowed any claim that respondent is constitutionally entitled to such treatment as would enable him "to achieve his maximum potential." Tr. of Oral Arg. 46–48.

> of a constitutional right to care and treatment is no longer a novel legal proposition." 644 F. 2d, at 176.

Chief Judge Seitz did not identify or otherwise define—beyond the right to reasonable safety and freedom from physical restraint—the "minimally adequate care and treatment" that appropriately may be required for this respondent.[24] In the circumstances presented by this case, and on the basis of the record developed to date, we agree with his view and conclude that respondent's liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint. In view of the kinds of treatment sought by respondent and the evidence of record, we need go no further in this case.[25]

III

A

We have established that Romeo retains liberty interests in safety and freedom from bodily restraint. Yet these in-

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[24] Chief Judge Seitz used the term "treatment" as synonymous with training or habilitation. See 644 F. 2d, at 181.

[25] It is not feasible, as is evident from the variety of language and formulations in the opinions below and the various briefs here, to define or identify the type of training that may be required in every case. A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case. A federal court, of course, must identify a constitutional predicate for the imposition of any affirmative duty on a State.

Because the facts in cases of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of the case before a court. Judge Aldisert, in his concurring opinion in the court below, was critical of the "majority's abandonment of incremental decision-making in favor of promulgation of broad standards . . . [that] lac[k] utility for the groups most affected by this decision." *Id.*, at 183–184. Judge Garth agreed that reaching issues not presented by the case requires a court to articulate principles and rules of law in "the absence of an appropriate record . . . and without the benefit of analysis, argument, or briefing" on such issues. *Id.*, at 186.

terests are not absolute; indeed to some extent they are in conflict. In operating an institution such as Pennhurst, there are occasions in which it is necessary for the State to restrain the movement of residents—for example, to protect them as well as others from violence.[26] Similar restraints may also be appropriate in a training program. And an institution cannot protect its residents from all danger of violence if it is to permit them to have any freedom of movement. The question then is not simply whether a liberty interest has been infringed but whether the extent or nature of the restraint or lack of absolute safety is such as to violate due process.

In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and "the demands of an organized society." *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty. In *Bell* v. *Wolfish*, 441 U. S. 520 (1979), for example, we considered a challenge to pretrial detainees' confinement conditions. We agreed that the detainees, not yet convicted of the crime charged, could not be punished. But we upheld those restrictions on liberty that were reasonably related to legitimate government objectives and not tantamount to punishment.[27] See *id.*, at 539. We have taken a

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[26] In Romeo's case, there can be no question that physical restraint was necessary at times. See n. 2, *supra*.

[27] See also *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972) (holding that an incompetent pretrial detainee cannot, after a competency hearing, be held indefinitely without either criminal process or civil commitment; due process requires, at a minimum, some rational relation between the nature and duration of commitment and its purpose). This case differs in critical respects from *Jackson*, a procedural due process case involving the validity of an involuntary commitment. Here, respondent was committed by a court on petition of his mother who averred that in view of his condition she could neither care for him nor control his violence. N. 2, *supra*. Thus,

similar approach in deciding procedural due process challenges to civil commitment proceedings. In *Parham* v. *J. R.*, 442 U. S. 584 (1979), for example, we considered a challenge to state procedures for commitment of a minor with parental consent. In determining that *procedural* due process did not mandate an adversarial hearing, we weighed the liberty interest of the individual against the legitimate interests of the State, including the fiscal and administrative burdens additional procedures would entail.[28] *Id.*, at 599–600.

Accordingly, whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests. If there is to be any uniformity in protecting these interests, this balancing cannot be left to the unguided discretion of a judge or jury. We therefore turn to consider the proper standard for determining whether a State adequately has protected the rights of the involuntarily committed mentally retarded.

B

We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints. He would have held that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." 644 F. 2d, at 178. Persons who have been involun-

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the purpose of respondent's commitment was to provide reasonable care and safety, conditions not available to him outside of an institution.

[28] See also *Addington* v. *Texas*, 441 U. S. 418 (1979). In that case, we held that the State must prove the need for commitment by "clear and convincing" evidence. See *id.*, at 431–432. We reached this decision by weighing the individual's liberty interest against the State's legitimate interests in confinement.

tarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. Cf. *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976). At the same time, this standard is lower than the "compelling" or "substantial" necessity tests the Court of Appeals would require a State to meet to justify use of restraints or conditions of less than absolute safety. We think this requirement would place an undue burden on the administration of institutions such as Pennhurst and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents.

Moreover, we agree that respondent is entitled to minimally adequate training. In this case, the minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints. In determining what is "reasonable"—in this and in any case presenting a claim for training by a State—we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.[29] Moreover, there certainly

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[29] See *Parham* v. *J. R.*, 442 U. S. 584, 608, n. 16 (1979) (In limiting judicial review of medical decisions made by professionals, "it is incumbent on courts to design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with difficult social problems"). See also *Rhodes* v. *Chapman*, 452 U. S. 337, 352 (1981) ("[C]ourts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system . . ."); *Bell* v. *Wolfish*, 441 U. S. 520, 539 (1979) (In the context of conditions of confinement of pretrial detainees, "[c]ourts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility"); *Wolff* v. *McDonnell*, 418 U. S. 539, 556 (1974) (In considering a pro-

is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. See *Parham* v. *J. R.*, *supra*, at 607; *Bell* v. *Wolfish*, *supra*, at 544 (Courts should not "'second-guess the expert administrators on matters on which they are better informed'"). For these reasons, the decision, if made by a professional,[30] is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.[31] In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability. See n. 13, *supra*.

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cedural due process claim in the context of prison, "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application"). See also Townsend & Mattson, The Interaction of Law and Special Education: Observing the Emperor's New Clothes, 1 Analysis and Intervention in Developmental Disabilities 75 (1981) (judicial resolution of rights of the handicapped can have adverse as well as positive effects on social change).

[30] By "professional" decisionmaker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care—including decisions that must be made without delay—necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons.

[31] All members of the Court of Appeals agreed that respondent's expert testimony should have been admitted. This issue was not included in the questions presented for certiorari, and we have no reason to disagree with the view that the evidence was admissible. It may be relevant to whether petitioners' decisions were a substantial departure from the requisite professional judgment. See *supra*, this page.

IV

In deciding this case, we have weighed those postcommitment interests cognizable as liberty interests under the Due Process Clause of the Fourteenth Amendment against legitimate state interests and in light of the constraints under which most state institutions necessarily operate. We repeat that the State concedes a duty to provide adequate food, shelter, clothing, and medical care. These are the essentials of the care that the State must provide. The State also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training. In this case, therefore, the State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.

Respondent thus enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests. Such conditions of confinement would comport fully with the purpose of respondent's commitment. Cf. *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972); see n. 27, *supra*. In determining whether the State has met its obligations in these respects, decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function. A single professional may have to make decisions with respect to a number of residents with widely varying needs and problems in the course of a normal day. The administrators, and par-

ticularly professional personnel, should not be required to make each decision in the shadow of an action for damages.

In this case, we conclude that the jury was erroneously instructed on the assumption that the proper standard of liability was that of the Eighth Amendment. We vacate the decision of the Court of Appeals and remand for further proceedings consistent with this decision.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE O'CONNOR join, concurring.

I join the Court's opinion. I write separately, however, to make clear why I believe that opinion properly leaves unresolved two difficult and important issues.

The first is whether the Commonwealth of Pennsylvania could accept respondent for "care and treatment," as it did under the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., Tit. 50, § 4406(b) (Purdon 1969), and then constitutionally refuse to provide him any "treatment," as that term is defined by state law. Were that question properly before us, in my view there would be a serious issue whether, as a matter of due process, the State could so refuse. I therefore do not find that issue to be a "frivolous" one, as THE CHIEF JUSTICE does, *post*, at 330, n. [1]

In *Jackson* v. *Indiana*, 406 U. S. 715 (1972), this Court, by a unanimous vote of all participating Justices, suggested a constitutional standard for evaluating the conditions of a civilly committed person's confinement: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.*, at 738. Under this standard,

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[1] See also Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756, 1787–1791 (1981); *Welsch* v. *Likins*, 550 F. 2d 1122, 1126, and n. 6 (CA8 1977); *Wyatt* v. *Aderholt*, 503 F. 2d 1305 (CA5 1974), aff'g *Wyatt* v. *Stickney*, 325 F. Supp. 781, 785 (MD Ala. 1971).

a State could accept a person for "safekeeping," then constitutionally refuse to provide him treatment. In such a case, commitment without treatment would bear a reasonable relation to the goal for which the person was confined.

If a state court orders a mentally retarded person committed for "care *and* treatment," however, I believe that due process might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals. In such a case, commitment without any "treatment" whatsoever would not bear a reasonable relation to the purposes of the person's confinement.

In respondent's case, the majority and principal concurring opinions in the Court of Appeals agreed that "[b]y basing [respondent's] deprivation of liberty at least partially upon a promise of treatment, the state ineluctably has committed the community's resources to providing minimal treatment." 644 F. 2d 147, 168 (CA3 1980).[2] Neither opinion clarified, however, whether respondent in fact had been totally denied "treatment," as that term is defined under Pennsylvania law. To the extent that the majority addressed the question, it found that "the evidence in the record, although somewhat contradictory, suggests not so much a total failure to treat as an inadequacy of treatment." *Ibid.*

This Court's reading of the record, *ante*, at 311–312, and n. 7, supports that conclusion. Moreover, the Court today finds that respondent's entitlement to "treatment" under Pennsylvania law was not properly raised below. See *ante*,

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[2] In the principal concurring opinion, Chief Judge Seitz, for himself and three other judges, stated:

"The state does not contest that it has placed the [respondent] in Pennhurst to provide basic care and treatment. Indeed, he has a right to treatment under state law, . . . and the fact that Pennhurst has programs and staff to treat patients is indicative of such a purpose. I believe that when the purpose of confining a mentally retarded person is to provide care and treatment, as is undoubtedly the case here, it violates the due process clause to fail to fulfill that purpose." 644 F. 2d, at 176.

at 316, n. 19. Given this uncertainty in the record, I am in accord with the Court's decision not to address the constitutionality of a State's total failure to provide "treatment" to an individual committed under state law for "care and treatment."

The second difficult question left open today is whether respondent has an independent constitutional claim, grounded in the Due Process Clause of the Fourteenth Amendment, to that "habilitation" or training necessary to *preserve* those basic self-care skills he possessed when he first entered Pennhurst—for example, the ability to dress himself and care for his personal hygiene. In my view, it would be consistent with the Court's reasoning today to include within the "minimally adequate training required by the Constitution," *ante*, at 322, such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commitment.

The Court makes clear, *ante*, at 315–316 and 324, that even after a person is committed to a state institution, he is entitled to such training as is necessary to prevent unreasonable losses of additional liberty as a result of his confinement—for example, unreasonable bodily restraints or unsafe institutional conditions. If a person could demonstrate that he entered a state institution with minimal self-care skills, but lost those skills after commitment because of the State's unreasonable refusal to provide him training, then, it seems to me, he has alleged a loss of liberty quite distinct from—and as serious as—the loss of safety and freedom from unreasonable restraints. For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know.

Although respondent asserts a claim of this kind, I agree with the Court that "[o]n the basis of the record before us, it is quite uncertain whether respondent [in fact] seeks any

'habilitation' or training unrelated to safety and freedom from bodily restraints."[3] *Ante*, at 318. Since the Court finds respondent constitutionally entitled at least to "such training as may be reasonable in light of [his] liberty interests in safety and freedom from unreasonable restraints," *ante*, at 322, I accept its decision not to address respondent's additional claim.

If respondent actually seeks habilitation in self-care skills not merely to reduce his aggressive tendencies, but also to maintain those basic self-care skills necessary to his personal autonomy within Pennhurst, I believe he is free on remand to assert that claim. Like the Court, I would be willing to defer to the judgment of professionals as to whether or not, and to what extent, institutional training would preserve re-

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[3] At trial, respondent's attorney requested a jury instruction that "[u]nder the Eighth and Fourteenth Amendments, state officials at a state mental hospital have a duty to provide residents of such institutions with such treatment as will afford them a reasonable opportunity to acquire *and maintain* those life skills necessary to cope as effectively as their capacities permit." App. to Pet. for Cert. 94a–95a (emphasis added).

In this Court, respondent again argued that "without minimal habilitative efforts—basic training in fundamental life skills—institutionalized retarded persons not only will fail to develop such skills independently *but also will lose the skills they may have brought with them into the institution*. . . . Indeed, putting aside increased risks of physical harm, if a retarded individual loses all of his previously acquired skills through prolonged institutional neglect, then the State has worked positive injury . . . . Once [retarded persons] have been confined they have no one but the State to turn to for help in gaining additional skills or, *at least, preserving whatever skills and abilities they have.*" Brief for Respondent 22–23 (emphasis added).

Respondent's description of the expert testimony to be offered on remand, however, suggests that he seeks training in self-care skills primarily to ensure his personal safety and the safety of others. See, *e. g.*, App. to Pet. for Cert. 100a (respondent's offer of proof that "when mentally retarded individuals learn alternative behavior, such as toilet training and dressing and so forth, [their] aggression decreases"); Brief for Respondent 22 (training in self-care skills is necessary to prevent development of "a variety of inappropriate, aggressive and self-destructive behaviors").

spondent's pre-existing skills. Cf. *ante*, at 321–323. As the Court properly notes, "[p]rofessionals in the habilitation of the mentally retarded disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible." *Ante*, at 316, n. 20.

If expert testimony reveals that respondent was so retarded when he entered the institution that he had no basic self-care skills to preserve, or that institutional training would not have preserved whatever skills he did have, then I would agree that he suffered no additional loss of liberty even if petitioners failed to provide him training. But if the testimony establishes that respondent possessed certain basic self-care skills when he entered the institution, and was sufficiently educable that he could have maintained those skills with a certain degree of training, then I would be prepared to listen seriously to an argument that petitioners were constitutionally required to provide that training, even if respondent's safety and mobility were not imminently threatened by their failure to do so.

The Court finds it premature to resolve this constitutional question on this less than fully developed record. Because I agree with that conclusion, I concur in the Court's opinion.

CHIEF JUSTICE BURGER, concurring in the judgment.

I agree with much of the Court's opinion. However, I would hold flatly that respondent has no constitutional right to training, or "habilitation," *per se*. The parties, and the Court, acknowledge that respondent cannot function outside the state institution, even with the assistance of relatives. Indeed, even now neither respondent nor his family seeks his discharge from state care. Under these circumstances, the State's provision of food, shelter, medical care, and living conditions as safe as the inherent nature of the institutional environment reasonably allows, serves to justify the State's custody of respondent. The State did not seek custody of respondent; his family understandably sought the State's aid to meet a serious need.

I agree with the Court that some amount of self-care instruction may be necessary to avoid unreasonable infringement of a mentally retarded person's interests in safety and freedom from restraint; but it seems clear to me that the Constitution does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation—even such as might be encompassed under the essentially standardless rubric "minimally adequate training," to which the Court refers. See *ante*, at 319, and n. 24. Cf. 644 F. 2d 147, 176 (CA3 1980) (Seitz, C. J., concurring in judgment). Since respondent asserts a right to "minimally adequate" habilitation "[q]uite apart from its relationship to decent care," Brief for Respondent 23, unlike the Court I see no way to avoid the issue.* Cf. *ante*, at 318.

I also point out that, under the Court's own standards, it is largely irrelevant whether respondent's experts were of the opinion that "additional training programs, including self-care programs, were needed to reduce [respondent's] aggressive behavior," *ibid.*—a prescription far easier for "spectators" to give than for an institution to implement. The training program devised for respondent by petitioners and other professionals at Pennhurst was, according to the Court's opinion, "presumptively valid"; and "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judg-

*Indeed, in the trial court respondent asserted a broad claim to such "treatment as [would] afford [him] a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit." App. to Pet. for Cert. 94a.

Respondent also maintains that, because state law purportedly creates a right to "care and treatment," he has a *federal substantive* right under the Due Process Clause to enforcement of this state right. See *ante*, at 316, n. 19. This contention is obviously frivolous; were every substantive right created by state law enforceable under the Due Process Clause, the distinction between state and federal law would quickly be obliterated.

ment." *Ante*, at 323. Thus, even if respondent could demonstrate that the training programs at Pennhurst were inconsistent with generally accepted or prevailing professional practice—if indeed there be such—this would not avail him so long as his training regimen was actually prescribed by the institution's professional staff.

Finally, it is worth noting that the District Court's instructions in this case were on the whole consistent with the Court's opinion today; indeed, some instructions may have been overly generous to respondent. Although the District Court erred in giving an instruction incorporating an Eighth Amendment "deliberate indifference" standard, the court also instructed, for example, that petitioners could be held liable if they "were aware of and failed to take all reasonable steps to prevent repeated attacks upon" respondent. See *ante*, at 312. Certainly if petitioners took "*all* reasonable steps" to prevent attacks on respondent, they cannot be said to have deprived him either of reasonably safe conditions or of training necessary to achieve reasonable safety.

ARIZONA *v.* MARICOPA COUNTY MEDICAL SOCIETY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80–419. Argued November 4, 1981—Decided June 18, 1982

Respondent foundations for medical care were organized by respondent Maricopa County Medical Society and another medical society to promote fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans. The foundations, by agreement of their member doctors, established the maximum fees the doctors may claim in full payment for health services provided to policyholders of specified insurance plans. Petitioner State of Arizona filed a complaint against respondents in Federal District Court, alleging that they were engaged in an illegal price-fixing conspiracy in violation of § 1 of the Sherman Act. The District Court denied the State's motion for partial summary judgment, but certified for interlocutory appeal the question whether the maximum-fee agreements were illegal *per se* under § 1 of the Sherman Act. The Court of Appeals affirmed the denial of the motion for partial summary judgment and held that the certified question could not be answered without evaluating the purpose and effect of the agreements at a full trial.

Held: The maximum-fee agreements, as price-fixing agreements, are *per se* unlawful under § 1 of the Sherman Act. Pp. 342–357.

(a) The agreements do not escape condemnation under the *per se* rule against price-fixing agreements because they are horizontal and fix maximum prices. Horizontal agreements to fix maximum prices are on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211; *Albrecht* v. *Herald Co.*, 390 U. S. 145. The *per se* rule is violated here by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, experience, training, or willingness to employ innovative and difficult procedures in individual cases. Such a restraint may also discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. P. 348.

(b) Nor does the fact that doctors rather than nonprofessionals are the parties to the price-fixing agreements preclude application of the *per se* rule. Respondents do not claim that the quality of the professional serv-

ices their members provide is enhanced by the price restraint, *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, and *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, distinguished, and their claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services. Pp. 348–349.

(c) That the judiciary has had little antitrust experience in the health care industry is insufficient reason for not applying the *per se* rule here. "[T]he Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 222. Pp. 349–351.

(d) The *per se* rule is not rendered inapplicable in this case for the alleged reason that the agreements in issue have procompetitive justification. The anticompetitive potential in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Even when respondents are given every benefit of doubt, the record in this case is not inconsistent with the presumption that respondents' agreements will not significantly enhance competition. The most that can be said for having doctors fix the maximum prices is that doctors may be able to do it more efficiently than insurers, but there is no reason to believe any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans. Pp. 351–354.

(e) Respondents' maximum-fee schedules do not involve price-fixing in only a literal sense. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, distinguished. As agreements among independent competing entrepreneurs, they fit squarely into the horizontal price-fixing mold. Pp. 355–357.

643 F. 2d 553, reversed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 357. BLACKMUN and O'CONNOR, JJ., took no part in the consideration or decision of the case.

Kenneth R. Reed, Special Assistant Attorney General of Arizona, argued the cause for petitioner. With him on the briefs were *Robert K. Corbin*, Attorney General, *Charles L. Eger*, Assistant Attorney General, *Alison B. Swan*, and *Patricia A. Metzger*.

Philip P. Berelson argued the cause for respondents. With him on the brief were *Robert O. Lesher* and *Daniel J. McAuliffe.*

Deputy Solicitor General Shapiro argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Assistant Attorney General Baxter, Deputy Solicitor General Wallace, Barry Grossman, Robert B. Nicholson,* and *Nancy C. Garrison.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Charles A. Graddick,* Attorney General of Alabama, and *Susan Beth Farmer, Sarah M. Spratling,* and *James Drury Flowers,* Assistant Attorneys General; *Wilson L. Condon,* Attorney General of Alaska, and *Louise E. Ma,* Assistant Attorney General; *Steve Clark,* Attorney General of Arkansas, and *David L. Williams,* Deputy Attorney General; *J. D. MacFarlane,* Attorney General of Colorado, and *B. Lawrence Theis,* First Assistant Attorney General; *Carl R. Ajello,* Attorney General of Connecticut, and *Robert M. Langer, John R. Lacey, John M. Looney, Jr.,* and *Steven M. Rutstein,* Assistant Attorneys General; *Richard S. Gebelein,* Attorney General of Delaware, and *Robert P. Lobue,* Deputy Attorney General; *Jim Smith,* Attorney General of Florida, and *Bill L. Bryant, Jr.,* Assistant Attorney General; *Tany S. Hong,* Attorney General of Hawaii, and *Sonia Faust,* Deputy Attorney General; *Tyrone C. Fahner,* Attorney General of Illinois, and *Thomas M. Genovese,* Assistant Attorney General; *Linley E. Pearson,* Attorney General of Indiana, and *Frank A. Baldwin,* Assistant Attorney General; *Thomas J. Miller,* Attorney General of Iowa, and *John R. Perkins,* Assistant Attorney General; *Robert T. Stephan,* Attorney General of Kansas, and *Carl M. Anderson,* Assistant Attorney General; *Steven L. Beshear,* Attorney General of Kentucky, and *James M. Ringo,* Assistant Attorney General; *William J. Guste, Jr.,* Attorney General of Louisiana, and *John R. Flowers, Jr.,* Assistant Attorney General; *James E. Tierney,* Attorney General of Maine; *Stephen H. Sachs,* Attorney General of Maryland, and *Charles O. Monk II,* Assistant Attorney General; *Frank J. Kelley,* Attorney General of Michigan, and *Edwin M. Bladen,* Assistant Attorney General; *Warren R. Spannaus,* Attorney General of Minnesota, and *Stephen P. Kilgriff,* Special Assistant Attorney General; *Bill Allain,* Attorney General of Mississippi, and *Robert E. Sand-*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, has been violated by agreements among competing physicians setting, by majority vote, the maximum fees that they may claim in full

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ers, Special Assistant Attorney General; *John Ashcroft*, Attorney General of Missouri, and *William L. Newcomb, Jr.*, Assistant Attorney General; *Michael T. Greely*, Attorney General of Montana, and *Jerome J. Cate*, Assistant Attorney General; *Paul L. Douglas*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General; *Gregory H. Smith*, Attorney General of New Hampshire; *James R. Zazzali*, Attorney General of New Jersey, and *Laurel A. Price*, Deputy Attorney General; *Jeff Bingaman*, Attorney General of New Mexico, and *James J. Wechsler* and *Richard H. Levin*, Assistant Attorneys General; *Robert Abrams*, Attorney General of New York, and *Lloyd Constantine*, Assistant Attorney General; *Rufus L. Edmisten*, Attorney General of North Carolina, *H. A. Cole, Jr.*, Special Deputy Attorney General, and *R. Darrell Hancock*, Associate Attorney General; *Robert O. Wefald*, Attorney General of North Dakota, and *Gary H. Lee*, Assistant Attorney General; *Jan Eric Cartwright*, Attorney General of Oklahoma, and *Gary W. Gardenshire*, Assistant Attorney General; *Dennis J. Roberts II*, Attorney General of Rhode Island, and *Patrick J. Quinlan*, Special Assistant Attorney General; *Daniel R. McLeod*, Attorney General of South Carolina, and *John M. Cox*, Assistant Attorney General; *Mark V. Meierhenry*, Attorney General of South Dakota, and *James E. McMahon*, Assistant Attorney General; *William M. Leech, Jr.*, Attorney General of Tennessee, and *William J. Haynes*, Deputy Attorney General; *Mark White*, Attorney General of Texas, and *Linda A. Aaker*, Assistant Attorney General; *David L. Wilkinson*, Attorney General of Utah, and *Peter C. Collins*, Assistant Attorney General; *John J. Easton, Jr.*, Attorney General of Vermont, and *Jay I. Ashman*, Assistant Attorney General; *Kenneth O. Eikenberry*, Attorney General of Washington, and *John R. Ellis*, Assistant Attorney General; *Chauncey H. Browning*, Attorney General of West Virginia, and *Charles G. Brown*, Deputy Attorney General; *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General; and *John D. Troughton*, Attorney General of Wyoming, and *Gay R. Venderpoel*, Assistant Attorney General; for the State of Ohio by *William J. Brown*, Attorney General, and *Charles D. Weller*, *Doreen C. Johnson*, and *Eugene F. McShane*, Assistant Attorneys General; for Chalmette General Hospi-

payment for health services provided to policyholders of specified insurance plans. The United States Court of Appeals for the Ninth Circuit held that the question could not be answered without evaluating the actual purpose and effect of the agreements at a full trial. 643 F. 2d 553 (1980). Because the undisputed facts disclose a violation of the statute, we granted certiorari, 450 U. S. 979 (1981), and now reverse.

I

In October 1978 the State of Arizona filed a civil complaint against two county medical societies and two "foundations for medical care" that the medical societies had organized. The complaint alleged that the defendants were engaged in illegal price-fixing conspiracies.[1] After the defendants filed their answers, one of the medical societies was dismissed by consent, the parties conducted a limited amount of pretrial discovery, and the State moved for partial summary judgment on the issue of liability. The District Court denied the motion,[2] but entered an order pursuant to 28 U. S. C. § 1292(b),

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tal, Inc., et al. by *John A. Stassi II;* and for Hospital Building Co. by *John K. Train III* and *John R. Jordan, Jr.*

Briefs of *amici curiae* urging affirmance were filed by *William G. Kopit* and *Robert J. Moses* for the American Association of Foundations for Medical Care; by *Richard L. Epstein* and *Jay H. Hedgepeth* for the American Hospital Association; and by *M. Laurence Popofsky* and *Peter F. Sloss* for California Dental Service.

Alfred Miller filed a brief for the American Association of Retired Persons et al. as *amici curiae.*

[1] The complaint alleged a violation of § 1 of the Sherman Act as well as of the Arizona antitrust statute. The state statute is interpreted in conformity with the federal statute. 643 F. 2d 533, 554, n. 1 (CA9 1980). The State of Arizona prayed for an injunction but did not ask for damages.

[2] The District Court offered three reasons for its decision. First, citing *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), the court stated that "a recent antitrust trend appears to be emerging where the Rule of Reason is the preferred method of determining whether a particular practice is in violation of the antitrust law." App. to Pet. for Cert. 43. Second, "the two Supreme Court cases invalidating maximum price-

certifying for interlocutory appeal the question "whether the FMC membership agreements, which contain the promise to abide by maximum fee schedules, are illegal per se under section 1 of the Sherman Act."[3]

The Court of Appeals, by a divided vote, affirmed the District Court's order refusing to enter partial summary judgment, but each of the three judges on the panel had a different view of the case. Judge Sneed was persuaded that "the challenged practice is not a per se violation." 643 F. 2d, at

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fixing, [*Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), and *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968)], need not be read as establishing a per se rule." *Id.*, at 44. Third, "a profession is involved here." *Id.*, at 45. Under the rule-of-reason approach, the plaintiff's motion for partial summary judgment on the issue of liability could not be granted "because there is insufficient evidence as to the [purpose and effect of the allegedly unlawful practices and the power of the defendants.]" *Id.*, at 47.

The District Court also denied the defendants' motion to dismiss based on the ground that they were engaged in the business of insurance within the meaning of the McCarran-Ferguson Act, 15 U. S. C. § 1011 *et seq.* See App. to Pet. for Cert. 39–41. The defendants did not appeal that portion of the District Court order. 643 F. 2d, at 559, and n. 7.

[3] The quoted language is the Court of Appeals' phrasing of the question. *Id.*, at 554. The District Court had entered an order on June 5, 1979, providing, in relevant part:

"The plaintiff's motion for partial summary judgment on the issue of liability is denied with leave to file a similar motion based on additional evidence if appropriate." App. to Pet. for Cert. 48.

On August 8, 1979, the District Court entered a further order providing:

"The Order of this Court entered June 5, 1979 is amended by addition of the following: This Court's determination that the Rule of Reason approach should be used in analyzing the challenged conduct in the instant case to determine whether a violation of Section 1 of the Sherman Act has occurred involves a question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order denying plaintiff's motion for partial summary judgment on the issue of liability may materially advance the ultimate determination of the litigation. Therefore, the foregoing Order and determination of the Court is certified for interlocutory appeal pursuant to 28 U. S. C. § 1292(b)." *Id.*, at 50–51.

560.[4] Judge Kennedy, although concurring, cautioned that he had not found "these reimbursement schedules to be per se proper, [or] that an examination of these practices under the rule of reason at trial will not reveal the proscribed adverse effect on competition, or that this court is foreclosed at some later date, when it has more evidence, from concluding that such schedules do constitute per se violations." *Ibid.*[5] Judge Larson dissented, expressing the view that a *per se* rule should apply and, alternatively, that a rule-of-reason analysis should condemn the arrangement even if a *per se* approach was not warranted. *Id.*, at 563–569.[6]

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[4] Judge Sneed explained his reluctance to apply the *per se* rule substantially as follows: The record did not indicate the actual purpose of the maximum-fee arrangements or their effect on competition in the health care industry. It was not clear whether the assumptions made about typical price restraints could be carried over to that industry. Only recently had this Court applied the antitrust laws to the professions. Moreover, there already were such significant obstacles to pure competition in the industry that a court must compare the prices that obtain under the maximum-fee arrangements with those that would otherwise prevail rather than with those that would prevail under ideal competitive conditions. Furthermore, the Ninth Circuit had not applied *Keifer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), and *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968), to horizontal agreements that establish maximum prices; some of the economic assumptions underlying the rule against maximum price fixing were not sound.

[5] Judge Kennedy's concurring opinion concluded as follows:

"There does not now appear to be a controlling or definitive analysis of the market impact caused by the arrangements under scrutiny in this case, but trial may reveal that the arrangements are, at least in their essentials, not peculiar to the medical industry and that they should be condemned." 643 F. 2d, at 560.

[6] Judge Larson stated, in part:

"Defendants formulated and dispersed relative value guides and conversion factor lists which together were used to set an upper limit on fees received from third-party payors. It is clear that these activities constituted maximum price-fixing by competitors. Disregarding any 'special industry' facts, this conduct is per se illegal. Precedent alone would mandate application of the per se standard.

"I find nothing in the nature of either the medical profession or the

Because the ultimate question presented by the certiorari petition is whether a partial summary judgment should have been entered by the District Court, we must assume that the respondents' version of any disputed issue of fact is correct. We therefore first review the relevant undisputed facts and then identify the factual basis for the respondents' contention that their agreements on fee schedules are not unlawful.

II

The Maricopa Foundation for Medical Care is a nonprofit Arizona corporation composed of licensed doctors of medicine, osteopathy, and podiatry engaged in private practice. Approximately 1,750 doctors, representing about 70% of the practitioners in Maricopa County, are members.

The Maricopa Foundation was organized in 1969 for the purpose of promoting fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans.[7] The foundation performs three primary activities. It establishes the schedule of maximum fees that participating doctors agree to accept as payment in full for services performed for patients insured under plans approved by the foundation. It reviews the medical necessity and appropriateness of treatment provided by its members to such insured persons. It is authorized to draw checks on insurance company accounts to pay doctors for

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health care industry that would warrant their exemption from per se rules for price-fixing." *Id.*, at 563–564 (citations omitted).

[7] Most health insurance plans are of the fee-for-service type. Under the typical insurance plan, the insurer agrees with the insured to reimburse the insured for "usual, customary, and reasonable" medical charges. The third-party insurer, and the insured to the extent of any excess charges, bears the economic risk that the insured will require medical treatment. An alternative to the fee-for-service type of insurance plan is illustrated by the health maintenance organizations authorized under the Health Maintenance Organization Act of 1973, 42 U. S. C. § 300e *et seq.* Under this form of prepaid health plan, the consumer pays a fixed periodic fee to a functionally integrated group of doctors in exchange for the group's agreement to provide any medical treatment that the subscriber might need. The economic risk is thus borne by the doctors.

services performed for covered patients. In performing these functions, the foundation is considered an "insurance administrator" by the Director of the Arizona Department of Insurance. Its participating doctors, however, have no financial interest in the operation of the foundation.

The Pima Foundation for Medical Care, which includes about 400 member doctors,[8] performs similar functions. For the purposes of this litigation, the parties seem to regard the activities of the two foundations as essentially the same. No challenge is made to their peer review or claim administration functions. Nor do the foundations allege that these two activities make it necessary for them to engage in the practice of establishing maximum-fee schedules.

At the time this lawsuit was filed,[9] each foundation made use of "relative values" and "conversion factors" in compiling its fee schedule. The conversion factor is the dollar amount used to determine fees for a particular medical specialty. Thus, for example, the conversion factors for "medicine" and "laboratory" were $8 and $5.50, respectively, in 1972, and $10 and $6.50 in 1974. The relative value schedule provides a numerical weight for each different medical service—thus, an office consultation has a lesser value than a home visit. The relative value was multiplied by the conversion factor to determine the maximum fee. The fee schedule has been revised periodically. The foundation board of trustees would solicit advice from various medical societies about the need

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[8] The record contains divergent figures on the percentage of Pima County doctors that belong to the foundation. A 1975 publication of the foundation reported 80%; a 1978 affidavit by the executive director of the foundation reported 30%.

[9] In 1980, after the District Court and the Court of Appeals had rendered judgment, both foundations apparently discontinued the use of relative values and conversion factors in formulating the fee schedules. Moreover, the Maricopa Foundation that year amended its bylaws to provide that the fee schedule would be adopted by majority vote of its board of trustees and not by vote of its members. The challenge to the foundation activities as we have described them in the text, however, is not mooted by these changes. See *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953).

for change in either relative values or conversion factors in their respective specialties. The board would then formulate the new fee schedule and submit it to the vote of the entire membership.[10]

The fee schedules limit the amount that the member doctors may recover for services performed for patients insured under plans approved by the foundations. To obtain this approval the insurers—including self-insured employers as well as insurance companies[11]—agree to pay the doctors' charges up to the scheduled amounts, and in exchange the doctors agree to accept those amounts as payment in full for their services. The doctors are free to charge higher fees to uninsured patients, and they also may charge any patient less than the scheduled maxima. A patient who is insured by a foundation-endorsed plan is guaranteed complete coverage for the full amount of his medical bills only if he is treated by a foundation member. He is free to go to a nonmember physician and is still covered for charges that do not exceed the maximum-fee schedule, but he must pay any excess that the nonmember physician may charge.

The impact of the foundation fee schedules on medical fees and on insurance premiums is a matter of dispute. The State of Arizona contends that the periodic upward revisions of the maximum-fee schedules have the effect of stabilizing and enhancing the level of actual charges by physicians, and

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[10] The parties disagree over whether the increases in the fee schedules are the cause or the result of the increases in the prevailing rate for medical services in the relevant markets. There appears to be agreement, however, that 85–95% of physicians in Maricopa County bill at or above the maximum reimbursement levels set by the Maricopa Foundation.

[11] Seven different insurance companies underwrite health insurance plans that have been approved by the Maricopa Foundation, and three companies underwrite the plans approved by the Pima Foundation. The record contains no firm data on the portion of the health care market that is covered by these plans. The State relies upon a 1974 analysis indicating that the insurance plans endorsed by the Maricopa Foundation had about 63% of the prepaid health care market, but the respondents contest the accuracy of this analysis.

that the increasing level of their fees in turn increases insurance premiums. The foundations, on the other hand, argue that the schedules impose a meaningful limit on physicians' charges, and that the advance agreement by the doctors to accept the maxima enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite and therefore serves as an effective cost-containment mechanism that has saved patients and insurers millions of dollars. Although the Attorneys General of 40 different States, as well as the Solicitor General of the United States and certain organizations representing consumers of medical services, have filed *amicus curiae* briefs supporting the State of Arizona's position on the merits, we must assume that the respondents' view of the genuine issues of fact is correct.

This assumption presents, but does not answer, the question whether the Sherman Act prohibits the competing doctors from adopting, revising, and agreeing to use a maximum-fee schedule in implementation of the insurance plans.

III

The respondents recognize that our decisions establish that price-fixing agreements are unlawful on their face. But they argue that the *per se* rule does not govern this case because the agreements at issue are horizontal and fix maximum prices, are among members of a profession, are in an industry with which the judiciary has little antitrust experience, and are alleged to have procompetitive justifications. Before we examine each of these arguments, we pause to consider the history and the meaning of the *per se* rule against price-fixing agreements.

A

Section 1 of the Sherman Act of 1890 literally prohibits *every* agreement "in restraint of trade."[12] In *United States*

[12] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1.

v. *Joint Traffic Assn.*, 171 U. S. 505 (1898), we recognized that Congress could not have intended a literal interpretation of the word "every"; since *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1 (1911), we have analyzed most restraints under the so-called "rule of reason." As its name suggests, the rule of reason requires the fact-finder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.[13]

The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958). Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609–610 (1972). And the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context. *Id.*, at 609, n. 10; *Northern Pacific R. Co.* v. *United States*, *supra*, at 5.

The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per*

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[13] Justice Brandeis provided the classic statement of the rule of reason in *Chicago Bd. of Trade* v. *United States*, 246 U. S. 231, 238 (1918):

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

se rules.[14] Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.[15] As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.[16]

Thus the Court in *Standard Oil* recognized that inquiry under its rule of reason ended once a price-fixing agreement was proved, for there was "a conclusive presumption which

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[14] For a thoughtful and brief discussion of the costs and benefits of rule-of-reason versus *per se* rule analysis of price-fixing agreements, see F. Scherer, Industrial Market Structure and Economic Performance 438–443 (1970). Professor Scherer's "opinion, shared by a majority of American economists concerned with antitrust policy, is that in the present legal framework the costs of implementing a rule of reason would exceed the benefits derived from considering each restrictive agreement on its merits and prohibiting only those which appear unreasonable." *Id.*, at 440.

[15] "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 5 (citations omitted). See *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522–523 (1948).

[16] Thus, in applying the *per se* rule to invalidate the restrictive practice in *United States* v. *Topco Associates, Inc.*, 405 U. S. 596 (1972), we stated that "[w]hether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us." *Id.*, at 609. The Court made the same point in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S., at 50, n. 16:

"*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."

brought [such agreements] within the statute." 221 U. S., at 65. By 1927, the Court was able to state that "it has . . . often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law." *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 398.

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." *Id.*, at 397–398.

Thirteen years later, the Court could report that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218 (1940). In that case a glut in the spot market for gasoline had prompted the major oil refiners to engage in a concerted effort to purchase and store surplus gasoline in order to maintain stable prices. Absent the agreement, the

companies argued, competition was cutthroat and self-defeating. The argument did not carry the day:

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Id.*, at 221–222.

The application of the *per se* rule to maximum-price-fixing agreements in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), followed ineluctably from *Socony-Vacuum:*

> "For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223: 'Under

> the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.'" 340 U. S., at 213.

Over the objection that maximum-price-fixing agreements were not the "economic equivalent" of minimum-price-fixing agreements,[17] *Kiefer-Stewart* was reaffirmed in *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968):

> "Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." *Id.*, at 152–153 (footnote omitted).

We have not wavered in our enforcement of the *per se* rule against price fixing. Indeed, in our most recent price-fixing case we summarily reversed the decision of another Ninth

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[17] *Albrecht* v. *Herald Co.*, 390 U. S., at 156 (Harlan, J., dissenting).

Circuit panel that a horizontal agreement among competitors to fix credit terms does not necessarily contravene the antitrust laws. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980).

B

Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices.[18] The *per se* rule "is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition." Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U. L. Rev. 137, 142 (1962). In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

Nor does the fact that doctors—rather than nonprofessionals—are the parties to the price-fixing agreements support the respondents' position. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788, n. 17 (1975), we stated that the "public service aspect, and other features of the professions, may

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[18] It is true that in *Kiefer-Stewart*, as in *Albrecht*, the agreement involved a vertical arrangement in which maximum resale prices were fixed. But the case also involved an agreement among competitors to impose the resale price restraint. In any event, horizontal restraints are generally less defensible than vertical restraints. See *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977); Easterbrook, Maximum Price Fixing, 48 U. Chi. L. Rev. 886, 890, n. 20 (1981).

require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." See *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 696 (1978). The price-fixing agreements in this case, however, are not premised on public service or ethical norms. The respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint. The respondents' claim for relief from the *per se* rule is simply that the doctors' agreement not to charge certain insureds more than a fixed price facilitates the successful marketing of an attractive insurance plan. But the claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services.

We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry.[19] The argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." 310 U. S., at 222. We also stated that "[t]he elimination of so-called competitive evils [in an industry] is no legal justification" for price-fixing agreements, *id.*, at 220, yet the Court of Appeals refused to apply the *per se* rule in

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[19] The argument should not be confused with the established position that a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged. See *White Motor Co.* v. *United States*, 372 U. S. 253 (1963). Nor is our unwillingness to examine the economic justification of this particular application of the *per se* rule against price fixing inconsistent with our reexamination of the general validity of the *per se* rule rejected in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, *supra*.

this case in part because the health care industry was so far removed from the competitive model.[20] Consistent with our prediction in *Socony-Vacuum*, 310 U. S., at 221, the result of this reasoning was the adoption by the Court of Appeals of a legal standard based on the reasonableness of the fixed prices,[21] an inquiry we have so often condemned.[22] Finally,

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[20] "The health care industry, moreover, presents a particularly difficult area. The first step to understanding is to recognize that not only is access to the medical profession very time consuming and expensive both for the applicant and society generally, but also that numerous government subventions of the costs of medical care have created both a demand and supply function for medical services that is artificially high. The present supply and demand functions of medical services in no way approximate those which would exist in a purely private competitive order. An accurate description of those functions moreover is not available. Thus, we lack baselines by which could be measured the distance between the present supply and demand functions and those which would exist under ideal competitive conditions." 643 F. 2d, at 556.

[21] "Perforce we must take industry as it exists, absent the challenged feature, as our baseline for measuring anticompetitive impact. The relevant inquiry becomes whether fees paid to doctors under that system would be less than those payable under the FMC maximum fee agreement. Put differently, confronted with an industry widely deviant from a reasonably free competitive model, such as agriculture, the proper inquiry is whether the practice enhances the prices charged for the services. In simplified economic terms, the issue is whether the maximum fee arrangement better permits the attainment of the monopolist's goal, viz., the matching of marginal cost to marginal revenue, or in fact obstructs that end." *Ibid.*

[22] In the first price-fixing case arising under the Sherman Act, the Court was required to pass on the sufficiency of the defendants' plea that they had established rates that were actually beneficial to consumers. Assuming the factual validity of the plea, the Court rejected the defense as a matter of law. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). In *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 689 (1978), we referred to Judge Taft's "classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable." See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), aff'd, 175 U. S. 211 (1899). In our latest price-fixing case, we reiterated the point: "It is no excuse that the prices fixed are themselves reasonable." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 647 (1980).

the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 5.

The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.[23] Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application. Even when the respondents are given every benefit of the doubt, the limited record in this case is not inconsistent with the presumption that the respondents' agreements will not significantly enhance competition.

The respondents contend that their fee schedules are procompetitive because they make it possible to provide consumers of health care with a uniquely desirable form of insurance coverage that could not otherwise exist. The features of the foundation-endorsed insurance plans that they stress are a choice of doctors, complete insurance coverage, and lower premiums. The first two characteristics, however, are hardly unique to these plans. Since only about 70% of

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[23] "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 (1940).

the doctors in the relevant market are members of either foundation, the guarantee of complete coverage only applies when an insured chooses a physician in that 70%. If he elects to go to a nonfoundation doctor, he may be required to pay a portion of the doctor's fee. It is fair to presume, however, that at least 70% of the doctors in other markets charge no more than the "usual, customary, and reasonable" fee that typical insurers are willing to reimburse in full.[24] Thus, in Maricopa and Pima Counties as well as in most parts of the country, if an insured asks his doctor if the insurance coverage is complete, presumably in about 70% of the cases the doctor will say "Yes" and in about 30% of the cases he will say "No."

It is true that a binding assurance of complete insurance coverage—as well as most of the respondents' potential for lower insurance premiums[25]—can be obtained only if the insurer and the doctor agree in advance on the maximum fee that the doctor will accept as full payment for a particular service. Even if a fee schedule is therefore desirable, it is not necessary that the doctors do the price fixing.[26] The

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[24] According to the respondents' figures, this presumption is well founded. See Brief for Respondents 42, n. 120.

[25] We do not perceive the respondents' claim of procompetitive justification for their fee schedules to rest on the premise that the fee schedules actually reduce medical fees and accordingly reduce insurance premiums, thereby enhancing competition in the health insurance industry. Such an argument would merely restate the long-rejected position that fixed prices are reasonable if they are lower than free competition would yield. It is arguable, however, that the existence of a fee schedule, whether fixed by the doctors or by the insurers, makes it easier—and to that extent less expensive—for insurers to calculate the risks that they underwrite and to arrive at the appropriate reimbursement on insured claims.

[26] According to a Federal Trade Commission staff report: "Until the mid-1960's, most Blue Shield plans determined in advance how much to pay for particular procedures and prepared fee schedules reflecting their determinations. Fee schedules are still used in approximately 25 percent of Blue Shield contracts." Bureau of Competition, Federal Trade Commission, Medical Participation in Control of Blue Shield and Certain Other Open-Panel Medical Prepayment Plans 128 (1979). We do not suggest

record indicates that the Arizona Comprehensive Medical/Dental Program for Foster Children is administered by the Maricopa Foundation pursuant to a contract under which the maximum-fee schedule is prescribed by a state agency rather than by the doctors.[27] This program and the Blue Shield plan challenged in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979), indicate that insurers are capable not only of fixing maximum reimbursable prices but also of obtaining binding agreements with providers guaranteeing the insured full reimbursement of a participating provider's fee. In light of these examples, it is not surprising that nothing in the record even arguably supports the conclusion that this type of insurance program could not function if the fee schedules were set in a different way.

The most that can be said for having doctors fix the maximum prices is that doctors may be able to do it more efficiently than insurers. The validity of that assumption is far from obvious,[28] but in any event there is no reason to believe

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that Blue Shield plans are not actually controlled by doctors. Indeed, as the same report discusses at length, the belief that they are has given rise to considerable antitrust litigation. See also D. Kass & P. Pautler, Bureau of Economics, Federal Trade Commission, Staff Report on Physician Control of Blue Shield Plans (1979). Nor does this case present the question whether an insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors. That question was not reached in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979). See *id.*, at 210, n. 5. In an *amicus curiae* brief, the United States expressed its opinion that such an arrangement would be legal unless the plaintiffs could establish that a conspiracy among providers was at work. Brief for United States as *Amicus Curiae*, O. T. 1978, No. 77–952, pp. 10–11. Our point is simply that the record provides no factual basis for the respondents' claim that the doctors must fix the fee schedule.

[27] In that program the foundation performs the peer review function as well as the administrative function of paying the doctors' claims.

[28] In order to create an insurance plan under which the doctor would agree to accept as full payment a fee prescribed in a fixed schedule, someone must canvass the doctors to determine what maximum prices would be high enough to attract sufficient numbers of individual doctors to sign up

that any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans. It is entirely possible that the potential or actual power of the foundations to dictate the terms of such insurance plans may more than offset the theoretical efficiencies upon which the respondents' defense ultimately rests.[29]

C

Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. *United States* v. *Topco Associates, Inc.*, 405 U. S., at 611–612. Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the *per se* rule in this case therefore are

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but low enough to make the insurance plan competitive. In this case that canvassing function is performed by the foundation; the foundation then deals with the insurer. It would seem that an insurer could simply bypass the foundation by performing the canvassing function and dealing with the doctors itself. Under the foundation plan, each doctor must look at the maximum-fee schedule fixed by his competitors and vote for or against approval of the plan (and, if the plan is approved by majority vote, he must continue or revoke his foundation membership). A similar, if to some extent more protracted, process would occur if it were each insurer that offered the maximum-fee schedule to each doctor.

[29] In this case it appears that the fees are set by a group with substantial power in the market for medical services, and that there is competition among insurance companies in the sale of medical insurance. Under these circumstances the insurance companies are not likely to have significantly greater bargaining power against a monopoly of doctors than would individual consumers of medical services.

better directed to the Legislature. Congress may consider the exception that we are not free to read into the statute.[30]

IV

Having declined the respondents' invitation to cut back on the *per se* rule against price fixing, we are left with the respondents' argument that their fee schedules involve price fixing in only a literal sense. For this argument, the respondents rely upon *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1 (1979).

In *Broadcast Music* we were confronted with an antitrust challenge to the marketing of the right to use copyrighted compositions derived from the entire membership of the American Society of Composers, Authors and Publishers (ASCAP). The so-called "blanket license" was entirely different from the product that any one composer was able to sell by himself.[31] Although there was little competition among individual composers for their separate compositions, the blanket-license arrangement did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price.[32] But a

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[30] "[Congress] can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach." *United States* v. *Topco Associates, Inc.*, 405 U. S., at 610, n. 10. Indeed, it has exempted certain industries from the full reach of the Sherman Act. See, *e. g.*, 7 U. S. C. §§ 291, 292 (Capper-Volstead Act, agricultural cooperatives); 15 U. S. C. §§ 1011–1013 (McCarran-Ferguson Act, insurance); 49 U. S. C. § 5b (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); 15 U. S. C. § 1801 (newspaper joint operating agreements).

[31] "Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material." 441 U. S., at 22 (footnote omitted).

[32] "Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions

"necessary consequence" of the creation of the blanket license was that its price had to be established. *Id.*, at 21. We held that the delegation by the composers to ASCAP of the power to fix the price for the blanket license was not a species of the price-fixing agreements categorically forbidden by the Sherman Act. The record disclosed price fixing only in a "literal sense." *Id.*, at 8.

This case is fundamentally different. Each of the foundations is composed of individual practitioners who compete with one another for patients. Neither the foundations nor the doctors sell insurance, and they derive no profits from the sale of health insurance policies. The members of the foundations sell medical services. Their combination in the form of the foundation does not permit them to sell any different product.[33] Their combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care.

The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market. The agreement under attack is

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covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets." *Id.*, at 23–24 (footnote omitted).

[33] It may be true that by becoming a member of the foundation the individual practitioner obtains a competitive advantage in the market for medical services that he could not unilaterally obtain. That competitive advantage is the ability to attract as customers people who value both the guarantee of full health coverage and a choice of doctors. But, as we have indicated, the setting of the price *by doctors* is not a "necessary consequence" of an arrangement with an insurer in which the doctor agrees not to charge certain insured customers more than a fixed price.

an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers. It is true that some are surgeons, some anesthesiologists, and some psychiatrists, but the doctors do not sell a package of three kinds of services. If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agreement among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price-fixing mold.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BLACKMUN and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The medical care plan condemned by the Court today is a comparatively new method of providing insured medical services at predetermined maximum costs. It involves no coercion. Medical insurance companies, physicians, and patients alike are free to participate or not as they choose. On its face, the plan seems to be in the public interest.

The State of Arizona challenged the plan on a *per se* antitrust theory. The District Court denied the State's summary judgment motion, and—because of the novelty of the issue—certified the question of *per se* liability for an interlocutory appeal. On summary judgment, the record and all inferences therefrom must be viewed in the light most favorable to the respondents. Nevertheless, rather than identifying clearly the controlling principles and remanding for decision on a completed record, this Court makes its own *per se* judgment of invalidity. The respondents' contention that

the "consumers" of medical services are benefited substantially by the plan is given short shrift. The Court concedes that "the parties conducted [only] a limited amount of pretrial discovery," *ante*, at 336, leaving undeveloped facts critical to an informed decision of this case. I do not think today's decision on an incomplete record is consistent with proper judicial resolution of an issue of this complexity, novelty, and importance to the public. I therefore dissent.

I

The Maricopa and Pima Foundations for Medical Care are professional associations of physicians organized by the medical societies in their respective counties.[1] The foundations were established to make available a type of prepaid medical insurance plan, aspects of which are the target of this litigation. Under the plan, the foundations insure no risks themselves. Rather, their key function is to secure agreement among their member physicians to a maximum-price schedule for specific medical services. Once a fee schedule has been agreed upon following a process of consultation and balloting, the foundations invite private insurance companies to participate by offering medical insurance policies based upon the maximum-fee schedule.[2] The insurers agree to offer com-

[1] The Pima Foundation is open to any Pima County area physician licensed in Arizona. It has a renewable 5-year membership term. A voluntary resignation provision permits earlier exit on the January 1 following announcement of an intent to resign.

The Maricopa Foundation admits physicians who are members of their county medical society. The Maricopa Foundation has a renewable 1-year term of membership. Initial membership may be for a term of less than a year so that a uniform annual termination date for all members can be maintained.

The medical *societies* are professional associations of physicians practicing in the particular county. The Pima County Medical Society, but not the Pima Foundation, has been dismissed from the case pursuant to a consent decree.

[2] Three private carriers underwrite various Pima Foundation-sponsored plans: Arizona Blue Cross-Blue Shield, Pacific Mutual Life Insurance Co.,

plete reimbursement to their insureds for the full amount of their medical bills—so long as these bills do not exceed the maximum-fee schedule.

An insured under a foundation-sponsored plan is free to go to any physician. The physician then bills the foundation directly for services performed.[3] If the insured has chosen a physician who is *not* a foundation member and the bill exceeds the foundation maximum-fee schedule, the insured is liable for the excess. If the billing physician *is* a foundation member, the foundation disallows the excess pursuant to the agreement each physician executed upon joining the foundation.[4] Thus, the plan offers complete coverage of medical expenses but still permits an insured to choose any physician.

II

This case comes to us on a plaintiff's motion for summary judgment after only limited discovery. Therefore, as noted above, the inferences to be drawn from the record must be viewed in the light most favorable to the respondents. *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962).

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and Connecticut General Life Insurance Co. The latter two companies also underwrite plans for the Maricopa Foundation, as do five other private insurance companies. Apparently large employers, such as the State of Arizona and Motorola, also act as foundation-approved insurers with respect to their employees' insurance plans.

[3] The foundations act as the insurance companies' claims agents on a contract basis. They administer the claims and, to some extent, review the medical necessity and propriety of the treatment for which a claim is entered. The foundations charge insurers a fee for their various services. In recent years, this fee has been set at 4% of the insurers' premiums.

[4] This agreement provides in part that the physician agrees "to be bound . . . with respect to maximum fees . . . by any fee determination by the [f]oundation consistent with the schedule adopted by the [foundation physician] membership . . . ." App. 31–32. The agreement also provides that foundation members "understand and agree that participating membership in the [f]oundation shall not affect the method of computation or amount of fees billed by me with respect to any medical care for any patient." *Ibid.*

This requires, as the Court acknowledges, that we consider the foundation arrangement as one that "impose[s] a meaningful limit on physicians' charges," that "enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite," and that "therefore serves as an effective cost containment mechanism that has saved patients and insurers millions of dollars." *Ante*, at 342. The question is whether we should condemn this arrangement forthwith under the Sherman Act, a law designed to *benefit* consumers.

Several other aspects of the record are of key significance but are not stressed by the Court. First, the foundation arrangement forecloses *no* competition. Unlike the classic cartel agreement, the foundation plan does not instruct potential competitors: "Deal with consumers on the following terms and no others." Rather, physicians who participate in the foundation plan are free both to associate with other medical insurance plans—at any fee level, high or low—and directly to serve uninsured patients—at any fee level, high or low. Similarly, insurers that participate in the foundation plan also remain at liberty to do business outside the plan with any physician—foundation member or not—at any fee level. Nor are physicians locked into a plan for more than one year's membership. See n. 1, *supra*. Thus freedom to compete, as well as freedom to withdraw, is preserved. The Court cites no case in which a remotely comparable plan or agreement is condemned on a *per se* basis.

Second, on this record we must find that insurers represent consumer interests. Normally consumers search for high quality at low prices. But once a consumer is insured[5]—*i. e.*, has chosen a medical insurance plan—he is

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[5] At least seven insurance companies are competing in the relevant market. See n. 2, *supra*. At this stage of the case we must infer that they are competing vigorously and successfully.

The term "consumer"—commonly used in antitrust cases and literature—is used herein to mean persons who need or may need medical services from a physician.

largely indifferent to the amount that his physician charges if the coverage is full, as under the foundation-sponsored plan.

The insurer, however, is *not* indifferent. To keep insurance premiums at a competitive level and to remain profitable, insurers—including those who have contracts with the foundations—step into the consumer's shoes with his incentive to contain medical costs. Indeed, insurers may be the only parties who have the effective power to restrain medical costs, given the difficulty that patients experience in comparing price and quality for a professional service such as medical care.

On the record before us, there is no evidence of opposition to the foundation plan by insurance companies—or, for that matter, by members of the public. Rather seven insurers willingly have chosen to contract out to the foundations the task of developing maximum-fee schedules.[6] Again, on the record before us, we must infer that the foundation plan—open as it is to insurers, physicians, and the public—has in fact benefited consumers by "enabl[ing] the insurance carriers to limit and to calculate more efficiently the risks they underwrite." *Ante*, at 342. Nevertheless, even though the case is here on an incomplete summary judgment record, the Court conclusively draws contrary inferences to support its *per se* judgment.

III

It is settled law that once an arrangement has been labeled as "price fixing" it is to be condemned *per se*. But it is equally well settled that this characterization is not to be ap-

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[6] The State introduced no evidence on its summary judgment motion supporting its apparent view that insurers effectively can perform this function themselves, without physician participation. It is clear, however, that price and quality of professional services—unlike commercial products—are difficult to compare. Cf. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 391–395 (1977) (opinion of POWELL, J.). This is particularly true of medical service. Presumably this is a reason participating insurers wish to utilize the foundations' services.

plied as a talisman to every arrangement that involves a literal fixing of prices. Many lawful contracts, mergers, and partnerships fix prices. But our cases require a more discerning approach. The inquiry in an antitrust case is not simply one of "determining whether two or more potential competitors have literally 'fixed' a 'price.' . . . [Rather], it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label *'per se* price fixing.' That will often, but not always, be a simple matter." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 9 (1979).

Before characterizing an arrangement as a *per se* price-fixing agreement meriting condemnation, a court should determine whether it is a "'naked restrain[t] of trade with no purpose except stifling of competition.'" *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 608 (1972), quoting *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963). See also *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49–50 (1977). Such a determination is necessary because "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Id.*, at 58–59. As part of this inquiry, a court must determine whether the procompetitive economies that the arrangement purportedly makes possible are substantial and realizable in the absence of such an agreement.

For example, in *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978), we held unlawful as a *per se* violation an engineering association's canon of ethics that prohibited competitive bidding by its members. After the parties had "compiled a voluminous discovery and trial record," *id.*, at 685, we carefully considered—rather than rejected out of hand—the engineers' "affirmative defense" of their agreement: that competitive bidding would tempt engineers to do inferior work that would threaten pub-

lic health and safety. *Id.*, at 693. We refused to accept this defense because its merits "confirm[ed] rather than refut[ed] the anticompetitive purpose and effect of [the] agreement." *Ibid.* The analysis incident to the "price fixing" characterization found no substantial procompetitive efficiencies. See also *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 646, n. 8, and 649–650 (1980) (challenged arrangement condemned because it lacked "a procompetitive justification" and had "no apparent potentially redeeming value").

In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, *supra*, there *was* minimum price fixing in the most "literal sense." *Id.*, at 8. We nevertheless agreed, unanimously,[7] that an arrangement by which copyright clearinghouses sold performance rights to their entire libraries on a blanket rather than individual basis did not warrant condemnation on a *per se* basis. Individual licensing would have allowed competition between copyright owners. But we reasoned that licensing on a blanket basis yielded substantial efficiencies that otherwise could not be realized. See *id.*, at 20–21. Indeed, the blanket license was itself "to some extent, a different product." *Id.*, at 22.[8]

In sum, the fact that a foundation-sponsored health insurance plan *literally* involves the setting of ceiling prices among competing physicians does not, of itself, justify condemning the plan as *per se* illegal. Only if it is clear from the record that the agreement among physicians is "so plainly

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[7] See *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S., at 25 (STEVENS, J., dissenting in part) ("The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding").

[8] Cf. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 54 (1977) (identifying achievement of efficiencies as "redeeming virtue" in decision sustaining an agreement against *per se* challenge); L. Sullivan, Law of Antitrust § 74, p. 200 (1977) (*per se* characterization inappropriate if price agreement achieves great economies of scale and thereby improves economic performance); *id.*, § 66, p. 180 (higher burden might reasonably be placed on plaintiff where agreement may involve efficiencies).

anticompetitive that no elaborate study of [its effects] is needed to establish [its] illegality" may a court properly make a *per se* judgment. *National Society of Professional Engineers* v. *United States*, *supra*, at 692. And, as our cases demonstrate, the *per se* label should not be assigned without carefully considering substantial benefits and procompetitive justifications. This is especially true when the agreement under attack is novel, as in this case. See *Broadcast Music*, *supra*, at 9–10; *United States* v. *Topco Associates, Inc.*, *supra*, at 607–608 ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations").

IV

The Court acknowledges that the *per se* ban against price fixing is not to be invoked every time potential competitors *literally* fix prices. *Ante*, at 355–357. One also would have expected it to acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves for the public procompetitive benefits that otherwise are not attainable. The Court does not do this. And neither does it provide alternative criteria by which the *per se* characterization is to be determined. It is content simply to brand this type of plan as "price fixing" and describe the agreement in *Broadcast Music*—which also literally involved the fixing of prices—as "fundamentally different." *Ante*, at 356.

In fact, however, the two agreements are similar in important respects. Each involved competitors and resulted in cooperative pricing.[9] Each arrangement also was prompted

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[9] In this case the physicians in effect vote on foundation maximum-fee schedules. In *Broadcast Music*, the copyright owners aggregated their copyrights into a group package, sold rights to the package at a group price, and distributed the proceeds among themselves according to an agreed-upon formula. See *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 562 F. 2d 130, 135–136 (CA2 1977).

by the need for better service to the consumers.[10] And each arrangement apparently makes possible a new product by reaping otherwise unattainable efficiencies.[11] The Court's effort to distinguish *Broadcast Music* thus is unconvincing.[12]

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[10] In this case, the foundations' maximum-fee schedules attempt to rectify the inflationary consequence of patients' indifference to the size of physicians' bills and insurers' commitment to reimburse whatever "usual, customary, and reasonable" charges physicians may submit. In *Broadcast Music*, the market defect inhered in the fact that "those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses." 441 U. S., at 4–5.

[11] In this case, the record before us indicates that insurers—those best situated to decide and best motivated to inspire trust in their judgment—believe that the foundations are the most efficient providers of the maximum-fee scheduling service. In *Broadcast Music*, we found that the blanket copyright clearinghouse system "reduce[d] costs absolutely . . . ." *Id.*, at 21.

[12] The Court states that in *Broadcast Music* "there was little competition among individual composers for their separate compositions." *Ante*, at 355. This is an irrational ground for distinction. Competition *could* have existed, 441 U. S., at 6; see also 562 F. 2d, at 134–135, 138, but did not because of the cooperative agreement. That competition yet persists among *physicians* is not a sensible reason to invalidate their agreement while refusing similarly to condemn the *Broadcast Music* agreements that were *completely* effective in eliminating competition.

The Court also offers as a distinction that the foundations do not permit the creation of "any different product." *Ante*, at 356. But the foundations provide a "different product" to precisely the same extent as did *Broadcast Music*'s clearinghouses. The clearinghouses provided only what copyright holders offered as individual sellers—the rights to use individual compositions. The clearinghouses were able to obtain these same rights more efficiently, however, because they eliminated the need to engage in individual bargaining with each individual copyright owner. See 441 U. S., at 21–22.

In the same manner, the foundations set up an innovative means to deliver a basic service—insured medical care from a wide range of physicians of one's choice—in a more economical manner. The foundations' maximum-fee schedules replace the weak cost containment incentives in typical

The Court, in defending its holding, also suggests that "respondents' arguments against application of the *per se* rule . . . are better directed to the Legislature." *Ante*, at 354–355. This is curious advice. The Sherman Act does not mention *per se* rules. And it was not Congress that decided *Broadcast Music* and the other relevant cases. Since the enactment of the Sherman Act in 1890, it has been the duty of *courts* to interpret and apply its general mandate—and to do so for the benefit of consumers.

As in *Broadcast Music*, the plaintiff here has not yet discharged its burden of proving that respondents have entered a plainly anticompetitive combination without a substantial and procompetitive efficiency justification. In my view, the District Court therefore correctly refused to grant the State's motion for summary judgment.[13] This critical and disputed issue of fact remains unresolved. See Fed. Rule Civ. Proc. 56(c).

"usual, customary, and reasonable" insurance agreements with a stronger cost control mechanism: an absolute ceiling on maximum fees that can be charged. The conduct of the insurers in this case indicates that they believe that the foundation plan as it presently exists is the most efficient means of developing and administering such schedules. At this stage in the litigation, therefore, we must agree that the foundation plan permits the more economical delivery of the basic insurance service—"to some extent, a different product." *Broadcast Music*, 441 U. S., at 22.

[13] Medical services differ from the typical service or commercial product at issue in an antitrust case. The services of physicians, rendered on a patient-by-patient basis, rarely can be compared by the recipient. A person requiring medical service or advice has no ready way of comparing physicians or of "shopping" for quality medical service at a lesser price. Primarily for this reason, the foundations—operating the plan at issue—perform a function that neither physicians nor prospective patients can perform individually. On a collective—and average—basis, the physicians themselves express a willingness to render certain identifiable services for not more than specified fees, leaving patients free to choose the physician. We thus have a case in which we derive little guidance from the conventional "perfect market" analysis of antitrust law. I would give greater weight than the Court to the uniqueness of medical services, and certainly would not invalidate on a *per se* basis a plan that may in fact perform a uniquely useful service.

V

I believe the Court's action today loses sight of the basic purposes of the Sherman Act. As we have noted, the antitrust laws are a "consumer welfare prescription." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 343 (1979). In its rush to condemn a novel plan about which it knows very little, the Court suggests that this end is achieved only by invalidating activities that *may* have some potential for harm. But the little that the record does show about the effect of the plan suggests that it is a means of providing medical services that in fact benefits rather than injures persons who need them.

In a complex economy, complex economic arrangements are commonplace. It is unwise for the Court, in a case as novel and important as this one, to make a final judgment in the absence of a complete record and where mandatory inferences create critical issues of fact.

Affirmance of the District Court's holding would not have immunized the medical service plan at issue. Nor would it have foreclosed an eventual conclusion on remand that the arrangement should be deemed *per se* invalid. And if the District Court had found that petitioner had failed to establish a *per se* violation of the Sherman Act, the question would have remained whether the plan comports with the rule of reason. See, *e. g.*, *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 441, n. 16 (1978).

UNITED STATES *v.* GOODWIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80–2195. Argued April 21, 1982—Decided June 18, 1982

After initially expressing an interest in plea bargaining on misdemeanor charges, respondent decided not to plead guilty and requested a trial by jury. While the misdemeanor charges were still pending, he was indicted and convicted in Federal District Court on a felony charge arising out of the same incident as the misdemeanor charges. Respondent moved to set aside the verdict on the ground of prosecutorial vindictiveness, contending that the felony indictment gave rise to an impermissible appearance of retaliation. The District Court denied the motion. The Court of Appeals reversed, holding that, although the prosecutor did not act with actual vindictiveness in seeking a felony indictment, the Due Process Clause prohibits the Government from bringing more serious charges against the defendant after he has invoked his right to a jury trial, unless the prosecutor comes forward with objective evidence that the increased charges could not have been brought before the defendant exercised his right. Believing that the circumstances surrounding the felony indictment gave rise to a genuine risk of retaliation, the court adopted a legal presumption of prosecutorial vindictiveness.

Held: A presumption of prosecutorial vindictiveness was not warranted in this case, and absent such a presumption no due process violation was established. Pp. 372–384.

(a) In cases in which action detrimental to a defendant has been taken after the exercise of a legal right, the presumption of an improper vindictive motive has been applied only where a reasonable likelihood of vindictiveness existed. *North Carolina* v. *Pearce*, 395 U. S. 711; *Blackledge* v. *Perry*, 417 U. S. 21. *Cf. Bordenkircher* v. *Hayes*, 434 U. S. 357. Pp. 372–380.

(b) A change in the prosecutor's charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision. It is unrealistic to assume that a prosecutor's probable response to such pretrial motions as to be tried by a jury is to seek to penalize and to deter. Here, the timing of the prosecutor's action suggests that a presumption of vindictiveness was not warranted. A prosecutor should remain free before trial to exercise his discretion to determine the extent of the societal interest in the prosecution. The ini-

tial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution. *Bordenkircher, supra.* Pp. 380–382.

(c) The nature of the right asserted by respondent confirms that a presumption of vindictiveness was not warranted in this case. The mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unwarranted. *Bordenkircher, supra.* Pp. 382–383.

(d) The fact that respondent, as opposed to having a bench trial, requested a jury trial does not compel a special presumption of prosecutorial vindictiveness whenever additional charges are thereafter brought. While there may have been an opportunity for vindictiveness here, a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule. The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness is certainly not warranted. Pp. 383–384.

637 F. 2d 250, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, at 385. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, at 386.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Shapiro*, and *Robert J. Erickson.*

Paul W. Spence, by appointment of the Court, 454 U. S. 1138, argued the cause and filed a brief for respondent.

JUSTICE STEVENS delivered the opinion of the Court.

This case involves presumptions. The question presented is whether a presumption that has been used to evaluate a judicial or prosecutorial response to a criminal defendant's exercise of a right to be retried after he has been convicted

should also be applied to evaluate a prosecutor's pretrial response to a defendant's demand for a jury trial.

After the respondent requested a trial by jury on pending misdemeanor charges, he was indicted and convicted on a felony charge. Believing that the sequence of events gave rise to an impermissible appearance of prosecutorial retaliation against the defendant's exercise of his right to be tried by jury, the United States Court of Appeals for the Fourth Circuit reversed the felony conviction. 637 F. 2d 250. Because this case presents an important question concerning the scope of our holdings in *North Carolina* v. *Pearce*, 395 U. S. 711, and *Blackledge* v. *Perry*, 417 U. S. 21, we granted the Government's petition for certiorari. 454 U. S. 1079.

I

Respondent Goodwin was stopped for speeding by a United States Park Policeman on the Baltimore-Washington Parkway. Goodwin emerged from his car to talk to the policeman. After a brief discussion, the officer noticed a clear plastic bag underneath the armrest next to the driver's seat of Goodwin's car. The officer asked Goodwin to return to his car and to raise the armrest. Respondent did so, but as he raised the armrest he placed the car into gear and accelerated rapidly. The car struck the officer, knocking him first onto the back of the car and then onto the highway. The policeman returned to his car, but Goodwin eluded him in a high-speed chase.

The following day, the officer filed a complaint in the District Court charging respondent with several misdemeanor and petty offenses, including assault. Goodwin was arrested and arraigned before a United States Magistrate. The Magistrate set a date for trial, but respondent fled the jurisdiction. Three years later Goodwin was found in custody in Virginia and was returned to Maryland.

Upon his return, respondent's case was assigned to an attorney from the Department of Justice, who was detailed

temporarily to try petty crime and misdemeanor cases before the Magistrate. The attorney did not have authority to try felony cases or to seek indictments from the grand jury. Respondent initiated plea negotiations with the prosecutor, but later advised the Government that he did not wish to plead guilty and desired a trial by jury in the District Court.[1]

The case was transferred to the District Court and responsibility for the prosecution was assumed by an Assistant United States Attorney. Approximately six weeks later, after reviewing the case and discussing it with several parties, the prosecutor obtained a four-count indictment charging respondent with one felony count of forcibly assaulting a federal officer and three related counts arising from the same incident.[2] A jury convicted respondent on the felony count and on one misdemeanor count.

Respondent moved to set aside the verdict on the ground of prosecutorial vindictiveness, contending that the indictment on the felony charge gave rise to an impermissible appearance of retaliation. The District Court denied the motion, finding that "the prosecutor in this case has adequately dispelled any appearance of retaliatory intent."[3]

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[1] At that time, there was no statutory provision allowing a trial by jury before a magistrate.

[2] By affidavit, the Assistant United States Attorney later set forth his reasons for this action: (1) he considered respondent's conduct on the date in question to be a serious violation of law, (2) respondent had a lengthy history of violent crime, (3) the prosecutor considered respondent's conduct to be related to major narcotics transactions, (4) the prosecutor believed that respondent had committed perjury at his preliminary hearing, and (5) respondent had failed to appear for trial as originally scheduled. The Government attorney stated that his decision to seek a felony indictment was not motivated in any way by Goodwin's request for a jury trial in District Court.

[3] App. to Pet. for Cert. 22a; cf. n. 2, *supra*. The District Court considered the merits of respondent's motion even though it was not timely filed in accordance with Rule 12(b)(1) of the Federal Rules of Criminal Procedure. The District Court found sufficient "cause" for respondent's procedural default pursuant to Federal Rule of Criminal Procedure 12(f). The

Although the Court of Appeals readily concluded that "the prosecutor did not act with actual vindictiveness in seeking a felony indictment," 637 F. 2d, at 252, it nevertheless reversed. Relying on our decisions in *North Carolina* v. *Pearce*, *supra*, and *Blackledge* v. *Perry*, *supra*, the court held that the Due Process Clause of the Fifth Amendment prohibits the Government from bringing more serious charges against a defendant after he has invoked his right to a jury trial, unless the prosecutor comes forward with objective evidence to show that the increased charges could not have been brought before the defendant exercised his rights. Because the court believed that the circumstances surrounding the felony indictment gave rise to a genuine risk of retaliation, it adopted a legal presumption designed to spare courts the "unseemly task" of probing the actual motives of the prosecutor. 637 F. 2d, at 255.

II

To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363. In a series of cases beginning with *North Carolina* v. *Pearce* and culminating in *Bordenkircher* v. *Hayes*, the Court has recognized this basic—and itself uncontroversial—principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.[4]

The imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive

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Court of Appeals did not consider the propriety of the District Court's ruling in this regard and neither do we.

[4] "[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (quoting *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 32–33, n. 20).

motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity. Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to "presume" an improper vindictive motive. Given the severity of such a presumption, however—which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct—the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists.

In *North Carolina* v. *Pearce*, the Court held that neither the Double Jeopardy Clause nor the Equal Protection Clause prohibits a trial judge from imposing a harsher sentence on retrial after a criminal defendant successfully attacks an initial conviction on appeal. The Court stated, however, that "[i]t can hardly be doubted that it would be a flagrant violation [of the Due Process Clause] of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." 395 U. S., at 723–724. The Court continued:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory

motivation on the part of the sentencing judge." *Id.*, at 725.

In order to assure the absence of such a motivation, the Court concluded:

> "[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, at 726.

In sum, the Court applied a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence.[5]

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[5] Two subsequent cases developed the principles set forth in *Pearce*. In *Colten* v. *Kentucky*, 407 U. S. 104, the Court refused to apply the prophylactic rule of *Pearce* to an allegation of vindictiveness that arose in a case involving Kentucky's two-tier system for adjudicating less serious criminal charges. In that system, a defendant who is convicted and sentenced in an inferior court is entitled to a trial *de novo* in a court of general jurisdiction. The defendant in *Colten* exercised that right and received a more severe sentence from the court of general jurisdiction. This Court found that "[t]he possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system." 407 U. S., at 116. The Court emphasized that the second trial was conducted, and the final sentence was imposed, by a different court that was not asked "to do over what it thought it had already done correctly." *Id.*, at 117. The Court noted: "It may often be that the superior court will impose a punishment more severe than that received from an inferior court. But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty." *Ibid.* Ultimately, the Court described the sentence received from the inferior tribunal as "in effect . . . no more than an offer in settlement." *Id.*, at 119.

In *Chaffin* v. *Stynchcombe*, 412 U. S. 17, the Court held that the prophylactic rule of *Pearce* does not apply when the second sentence is im-

In *Blackledge* v. *Perry*, 417 U. S. 21, the Court confronted the problem of increased punishment upon retrial after appeal in a setting different from that considered in *Pearce*. Perry was convicted of assault in an inferior court having exclusive jurisdiction for the trial of misdemeanors. The court imposed a 6-month sentence. Under North Carolina law, Perry had an absolute right to a trial *de novo* in the Superior Court, which possessed felony jurisdiction. After Perry filed his notice of appeal, the prosecutor obtained a felony indictment charging him with assault with a deadly weapon. Perry pleaded guilty to the felony and was sentenced to a term of five to seven years in prison.

In reviewing Perry's felony conviction and increased sentence,[6] this Court first stated the essence of the holdings in *Pearce* and the cases that had followed it:

> "The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'" 417 U. S., at 27.

The Court held that the opportunities for vindictiveness in the situation before it were such "as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Ibid.* It explained:

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posed on retrial by a jury. The Court emphasized that the decision in *Pearce* "was premised on the apparent need to guard against *vindictiveness* in the resentencing process." 412 U. S., at 25 (emphasis in original). The Court found that the possibility of vindictiveness was *de minimis* when resentencing was by jury in a properly controlled retrial. The Court noted that (1) the jury typically will not be aware of the prior sentence, (2) the jury, unlike a judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication, and (3) the jury will not likely be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals. *Id.*, at 26–27.

[6] The Court held that in pleading guilty Perry had not waived the right "not to be haled into court at all upon the felony charge." 417 U. S., at 30.

> "A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial." *Id.*, at 27–28.

The Court emphasized in *Blackledge* that it did not matter that no evidence was present that the prosecutor had acted in bad faith or with malice in seeking the felony indictment.[7] As in *Pearce*, the Court held that the likelihood of vindictiveness justified a presumption that would free defendants of apprehension of such a retaliatory motivation on the part of the prosecutor.[8]

Both *Pearce* and *Blackledge* involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted. The decisions in these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of *stare decisis*, res judicata, the law of the case, and double jeopardy all are based, at least in part, on that deep-seated bias.

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[7] "There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry." *Id.*, at 28.

[8] The presumption again could be overcome by objective evidence justifying the prosecutor's action. The Court noted: "This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz* v. *United States*, 223 U. S. 442." *Id.*, at 29, n. 7.

While none of these doctrines barred the retrials in *Pearce* and *Blackledge*, the same institutional pressure that supports them might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.

In *Bordenkircher* v. *Hayes*, 434 U. S. 357, the Court for the first time considered an allegation of vindictiveness that arose in a pretrial setting. In that case the Court held that the Due Process Clause of the Fourteenth Amendment did not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the offense with which he was originally charged. The prosecutor in that case had explicitly told the defendant that if he did not plead guilty and "save the court the inconvenience and necessity of a trial" he would return to the grand jury to obtain an additional charge that would significantly increase the defendant's potential punishment.[9] The defendant refused to plead guilty and the prosecutor obtained the indictment. It was not disputed that the additional charge was justified by the evidence, that the prosecutor was in possession of this evidence at the time the original indictment was obtained, and that the prosecutor sought the additional charge because of the accused's refusal to plead guilty to the original charge.

In finding no due process violation, the Court in *Bordenkircher* considered the decisions in *Pearce* and *Blackledge*, and stated:

> "In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation 'very different from the give-and-

[9] The prosecutor advised the defendant that he would obtain an indictment under the Kentucky Habitual Criminal Act, which would subject the accused to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Absent the additional indictment, the defendant was subject to a punishment of 2 to 10 years in prison.

> take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.' *Parker* v. *North Carolina*, 397 U. S. 790, 809 (opinion of BRENNAN, J.)." 434 U. S., at 362.

The Court stated that the due process violation in *Pearce* and *Blackledge* "lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." 434 U. S., at 363.

The Court held, however, that there was no such element of punishment in the "give-and-take" of plea negotiation, so long as the accused "is free to accept or reject the prosecution's offer." *Ibid.* The Court noted that, by tolerating and encouraging the negotiation of pleas, this Court had accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his constitutional right to stand trial. The Court concluded:

> "We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment." *Id.*, at 365.

The outcome in *Bordenkircher* was mandated by this Court's acceptance of plea negotiation as a legitimate process.[10] In declining to apply a presumption of vindictiveness,

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[10] Cf. 434 U. S., at 364–365 ("To hold that the prosecutor's desire to induce a guilty plea . . . may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself"). If a prosecutor could not threaten to bring additional charges dur-

the Court recognized that "additional" charges obtained by a prosecutor could not necessarily be characterized as an impermissible "penalty." Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation—in often what is clearly a "benefit" to the defendant—changes in the charging decision that occur in the

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ing plea negotiation, and then obtain those charges when plea negotiation failed, an equally compelling argument could be made that a prosecutor's initial charging decision could never be influenced by what he hoped to gain in the course of plea negotiation. Whether "additional" charges were brought originally and dismissed, or merely threatened during plea negotiations, the prosecutor could be accused of using those charges to induce a defendant to forgo his right to stand trial. If such use of "additional" charges were presumptively invalid, the institution of plea negotiation could not survive. Thus, to preserve the plea negotiation process, with its correspondent advantages for both the defendant and the State, the Court in *Bordenkircher* held that "additional" charges *may* be used to induce a defendant to plead guilty. Once that conclusion was accepted, it necessarily followed that it did not matter whether the "additional" charges were obtained in the original indictment or merely threatened in plea negotiations and obtained once those negotiations broke down. In the former situation, the prosecutor could be said simply to have "anticipated" that the defendant might refuse to plead guilty and, as a result, to have placed his "threat" in the original indictment. Cf. *id.*, at 360–361 ("As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain").

The decision in *Bordenkircher* also was influenced by the fact that, had the Court recognized a distinction of constitutional dimension between the dismissal of charges brought in an original indictment and the addition of charges after plea negotiation, the aggressive prosecutor would merely be prompted "to bring the greater charge initially in every case, and only thereafter to bargain." *Id.*, at 368 (BLACKMUN, J., dissenting). The consequences of such a decision often would be prejudicial to defendants, for an accused "would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea." *Ibid.* Moreover, in those cases in which a defendant accepted the prosecution's offer, his reputation would be spared the unnecessary damage that would result from the placement of the additional charge on the public record.

context of plea negotiation are an inaccurate measure of improper prosecutorial "vindictiveness."[11] An initial indictment—from which the prosecutor embarks on a course of plea negotiation—does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.[12]

III

This case, like *Bordenkircher*, arises from a pretrial decision to modify the charges against the defendant. Unlike *Bordenkircher*, however, there is no evidence in this case that could give rise to a claim of *actual* vindictiveness; the

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[11] The Court in *Bordenkircher* stated that the validity of a pretrial charging decision must be measured against the broad discretion held by the prosecutor to select the charges against an accused. "Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.*, at 364 (quoting *Oyler* v. *Boles*, 368 U. S. 448, 456). A charging decision does not levy an improper "penalty" unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the societal interest in prosecution. See Westen & Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Calif. L. Rev. 471, 486 (1978).

[12] In rejecting a presumption of vindictiveness, the Court in *Bordenkircher* did not foreclose the possibility that a defendant might prove through objective evidence an improper prosecutorial motive. In the case before it, however, the Court did not find such proof in the fact that the prosecutor had stated explicitly that additional charges were brought to persuade the defendant to plead guilty. The fact that the prosecutor threatened the defendant did not prove that the action threatened was not permissible; the prosecutor's conduct did not establish that the additional charges were brought solely to "penalize" the defendant and could not be justified as a proper exercise of prosecutorial discretion.

prosecutor never suggested that the charge was brought to influence the respondent's conduct.[13] The conviction in this case may be reversed only if a *presumption* of vindictiveness—applicable in all cases—is warranted.

There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

Thus, the timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted.

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[13] See n. 12, *supra*.

A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.[14] As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.[15]

The nature of the right asserted by the respondent confirms that a presumption of vindictiveness is not warranted in this case. After initially expressing an interest in plea negotiation, respondent decided not to plead guilty and requested a trial by jury in District Court. In doing so, he forced the Government to bear the burdens and uncertainty of a trial. This Court in *Bordenkircher* made clear that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging deci-

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[14] We recognize that prosecutors may be trained to bring all legitimate charges against an individual at the outset. Certainly, a prosecutor should not file any charge until he has investigated fully all of the circumstances surrounding a case. To presume that every case is complete at the time an initial charge is filed, however, is to presume that every prosecutor is infallible—an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources. Moreover, there are certain advantages in avoiding a rule that would compel prosecutors to attempt to place every conceivable charge against an individual on the public record from the outset. See n. 10, *supra*.

[15] Respondent argues that the Court's refusal to presume vindictiveness in *Bordenkircher* is not controlling in this case because he had refused to plead guilty and the plea negotiation process was over. Respondent's argument is not strengthened, however, by the fact that the additional charge in this case was brought outside the context of plea negotiation. The fact that the increased charge in *Bordenkircher* was brought after a "warning" made during plea negotiation was the principal basis for the defendant's claim that the charge was an unjustified response to his legal right to stand trial. But cf. n. 12, *supra*. Respondent's argument in this case has no such predicate; unlike the defendant in *Bordenkircher*, the only evidence respondent is able to marshal in support of his allegation of vindictiveness is that the additional charge was brought at a point in time after his exercise of a protected legal right.

sion are unjustified. Respondent argues that such a presumption is warranted in this case, however, because he not only requested a trial—he requested a trial by jury.

We cannot agree. The distinction between a bench trial and a jury trial does not compel a special presumption of prosecutorial vindictiveness whenever additional charges are brought after a jury is demanded. To be sure, a jury trial is more burdensome than a bench trial. The defendant may challenge the selection of the venire; the jury itself must be impaneled; witnesses and arguments must be prepared more carefully to avoid the danger of a mistrial. These matters are much less significant, however, than the facts that before either a jury or a judge the State must present its full case against the accused and the defendant is entitled to offer a full defense. As compared to the complete trial *de novo* at issue in *Blackledge*, a jury trial—as opposed to a bench trial—does not require duplicative expenditures of prosecutorial resources before a final judgment may be obtained. Moreover, unlike the trial judge in *Pearce*, no party is asked "to do over what it thought it had already done correctly."[16] A prosecutor has no "personal stake" in a bench trial and thus no reason to engage in "self-vindication" upon a defendant's request for a jury trial.[17] Perhaps most importantly, the institutional bias against the retrial of a decided question that supported the decisions in *Pearce* and *Blackledge* simply has no counterpart in this case.[18]

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[16] Cf. *Colten* v. *Kentucky*, 407 U. S., at 117.

[17] Cf. *Chaffin* v. *Stynchcombe*, 412 U. S., at 27.

[18] Indeed, there is a strong tradition in this country in favor of jury trials, despite the additional burdens that they entail for all parties. In many cases—and for many reasons—both the judge and the prosecutor may prefer to have a case tried by jury. See, *e. g.*, *Vines* v. *Muncy*, 553 F. 2d 342 (CA4 1977); *United States* v. *Morlang*, 531 F. 2d 183 (CA4 1975); *United States* v. *Ceja*, 451 F. 2d 399 (CA1 1971); see also Fed. Rule Crim. Proc. 23(a). In *Singer* v. *United States*, 380 U. S. 24, this Court held that a criminal defendant does not have a constitutional right to waive a jury trial and to have his case tried before a judge alone. The Court stated: "Trial by jury has been established by the Constitution as the 'normal and . . .

There is an opportunity for vindictiveness, as there was in *Colten* and *Chaffin*. Those cases demonstrate, however, that a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule. As *Blackledge* makes clear, "the Due Process Clause is not offended by all possibilities of increased punishment . . . but only by those that pose a realistic likelihood of 'vindictiveness.'" 417 U. S., at 27. The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted.

IV

In declining to apply a presumption of vindictiveness, we of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.[9] In this case, however, the Court of Appeals stated: "On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment." 637 F. 2d, at 252. Respondent does not challenge that finding. Absent a presumption of vindictiveness, no due process violation has been established.

The judgment of the Court of Appeals is reversed. The

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preferable mode of disposing of issues of fact in criminal cases.' *Patton* v. *United States*, 281 U. S. 276, 312." *Id.*, at 35.

[9] As the Government states in its brief:

"Accordingly, while the prosecutor's charging decision is presumptively lawful, and the prosecutor is not required to sustain any burden of justification for an increase in charges, the defendant is free to tender evidence to the court to support a claim that enhanced charges are a direct and unjustifiable penalty for the exercise of a procedural right. Of course, only in a rare case would a defendant be able to overcome the presumptive validity of the prosecutor's actions through such a demonstration." Brief for United States 28, n. 9.

case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in the judgment.

Like JUSTICE BRENNAN, I believe that our precedents mandate the conclusion that "a realistic likelihood of 'vindictiveness'" arises in this context. *Blackledge* v. *Perry*, 417 U. S. 21, 27 (1974). The Assistant United States Attorney responsible for increasing the charges against respondent was aware of the initial charging decision; he had the means available to discourage respondent from electing a jury trial in District Court; he had a substantial stake in dissuading respondent from exercising that option; and he was familiar with, and sensitive to, the institutional interests that favored a trial before the Magistrate.

Moreover, I find no support in our prior cases for any distinction between pretrial and post-trial vindictiveness. As I have said before: "Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness. The Due Process Clause should protect an accused against it, however it asserts itself." *Bordenkircher* v. *Hayes*, 434 U. S. 357, 368 (1978) (dissenting opinion). And, as JUSTICE BRENNAN points out, *Bordenkircher* does not dictate the result here. In fact, in *Bordenkircher* the Court expressly distinguished and left *unresolved* cases such as this one, "where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original [charges] had ended with the defendant's insistence on pleading not guilty." *Id.*, at 360.

The Court's ruling in *Bordenkircher* did not depend on a distinction between the pretrial and post-trial settings: rather, the Court declined to apply its prior opinions in *Blackledge* and *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), because those cases involved "the State's unilateral imposition of a penalty," rather than "'the give-and-take negotiation common in plea bargaining.'" 434 U. S., at

362, quoting *Parker* v. *North Carolina*, 397 U. S. 790, 809 (1970) (opinion of BRENNAN, J.). Here, as in *Pearce* and *Blackledge*, the prosecutor unilaterally imposed a penalty in response to respondent's exercise of a legal right.

Adopting the prophylactic rule of *Pearce* and *Blackledge* in this case will not, as the Court would insist, undercut "the broad discretion entrusted to [the prosecutor] to determine the extent of the societal interest in prosecution." *Ante*, at 382. "[T]he prosecutor initially 'makes a discretionary determination that the interests of the state are served by not seeking more serious charges.'" *Bordenkircher* v. *Hayes*, 434 U. S., at 367 (dissenting opinion), quoting *Hayes* v. *Cowan*, 547 F. 2d 42, 44 (CA6 1976). Moreover, the Due Process Clause does not deprive a prosecutor of the flexibility to add charges after a defendant has decided not to plead guilty and has elected a jury trial in District Court—so long as the adjustment is based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original" charging decision. *North Carolina* v. *Pearce*, 395 U. S., at 726. In addition, I believe that the prosecutor adequately explains an increased charge by pointing to objective information that he could not reasonably have been aware of at the time charges were initially filed. Cf. *ante*, at 381.

Because I find that the Assistant United States Attorney's explanation for seeking a felony indictment satisfies these standards, see *ante*, at 371, n. 2, I conclude that the Government has dispelled the appearance of vindictiveness and, therefore, that the imposition of additional charges did not violate respondent's due process rights. Accordingly, I concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In *Blackledge* v. *Perry*, 417 U. S. 21 (1974), this Court held that the Due Process Clause prohibits a prosecutor from re-

sponding to the defendant's invocation of his statutory right to a trial *de novo* by bringing more serious charges against him that arise out of the same conduct. In the case before us, the prosecutor responded to the defendant's invocation of his statutory *and constitutional* right to a trial *by jury* by raising petty offenses to felony charges based on the same conduct. Yet the Court holds, in the teeth of *Blackledge*, that here there is no denial of due process. In my view, *Blackledge* requires affirmance of the Court of Appeals, and the Court's attempt to distinguish that case from the present one is completely unpersuasive.

The salient facts of this case are quite simple. Respondent was originally charged with several petty offenses and misdemeanors—speeding, reckless driving, failing to give aid at the scene of an accident, fleeing from a police officer, and assault by striking a police officer—arising from his conduct on the Baltimore-Washington Parkway. Assuming that respondent had been convicted on every count charged in this original complaint, the maximum punishment to which he conceivably could have been exposed was fines of $3,500 and 28 months in prison.[1] Because all of the charges against respondent were petty offenses or misdemeanors, they were scheduled for trial before a magistrate, see 28 U. S. C. § 636(a)(3); 18 U. S. C. § 3401(a), who was not authorized to

[1] Two counts of "speeding" and one count of "reckless driving," in violation of 36 CFR §§ 50.31, 50.32 (1981), are each punishable by fines of not more than $500, or imprisonment for not more than six months, or both, 36 CFR § 50.5(a) (1981). One count of "failing to give aid at the scene of an accident," in violation of 18 U. S. C. §§ 7, 13, Md. Transp. Code Ann. §§ 20–102, 20–104 (1977), is punishable by a fine of not more than $1,000, or imprisonment for not more than four months, or both, §§ 27–101(c)(12), (14). One count of "fleeing from a police officer," in violation of 18 U. S. C. §§ 7, 13, Md. Transp. Code Ann. § 21–904 (1977), is punishable by a fine of not more than $500, § 27–101(b). One count of "assault by striking" a police officer, in violation of 18 U. S. C. § 113(d), is punishable by a fine of not more than $500, or imprisonment for not more than six months, or both.

conduct jury trials, see *ante*, at 371, n. 1. In addition, the case was assigned to a prosecutor who, owing to inexperience, was not even authorized to try felony cases. Thus the Government recognized that respondent's alleged crimes were relatively minor, and attempted to dispose of them in an expedited manner. But respondent frustrated this attempt at summary justice by demanding a jury trial in Federal District Court. This was his right, of course, not only under the applicable statute, 18 U. S. C. § 3401(b), but also under the Constitution.[2]

Respondent's demand required that the case be transferred from the Magistrate's Court in Hyattsville to the District Court in Baltimore, and that the prosecution be reassigned to an Assistant United States Attorney, who was authorized to prosecute cases in the District Court. The new prosecutor sought and obtained a second, four-count indictment, in which the same conduct originally charged as petty-offense and misdemeanor counts was now charged as a misdemeanor and two felonies: assaulting, resisting, or impeding a federal officer with a deadly weapon, and assault with a dangerous weapon. If we assume (as before) that respondent was convicted on all of these charges, his maximum exposure to punishment had now become fines of $11,500 and 15 years in prison.[3] Respondent's claim below was that such

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[2] See *District of Columbia* v. *Colts*, 282 U. S. 63, 73–74 (1930); *United States* v. *Hamdan*, 552 F. 2d 276, 278–280 (CA9 1977); *United States* v. *Sanchez-Meza*, 547 F. 2d 461, 464–465 (CA9 1976); *United States* v. *Potvin*, 481 F. 2d 380, 381–383 (CA10 1973).

[3] "Assaulting, resisting, or impeding" a federal officer with a deadly weapon, in violation of 18 U. S. C. § 111, is punishable by a fine of not more than $10,000, or imprisonment for not more than 10 years, or both. "Assault with a dangerous weapon," in violation of 18 U. S. C. § 113(c), is punishable by a fine of not more than $1,000, or imprisonment for not more than five years, or both. A third count in the new indictment was "fleeing from a police officer," in violation of 18 U. S. C. §§ 7, 13, Md. Transp. Code Ann. § 21–904 (1977), which is punishable by a fine of not more than $500, § 27–101(b). The fourth count of the indictment was "failure to appear," in violation of 18 U. S. C. § 3150.

an elevation of the charges against him from petty offenses to felonies, following his exercise of his statutory and constitutional right to a jury trial, reflected prosecutorial vindictiveness that denied him due process of law.

The Court attempts to denigrate respondent's claim by asserting that this case "involves presumptions," *ante*, at 369, and by arguing that "there is no evidence in this case that could give rise to a claim of *actual* vindictiveness," *ante*, at 380 (emphasis in original). By casting respondent's claim in terms of a "mere" legal presumption, the Court hopes to make that claim appear to be unreal or technical. But such an approach is contrary to the letter and spirit of *Blackledge*. There we focused upon the accused's "apprehension of . . . retaliatory motivation," 417 U. S., at 28, and we held that the Due Process Clause is violated when situations involving increased punishment "pose a realistic likelihood of 'vindictiveness,'" *id.*, at 27. In such situations, the criminal defendant's apprehension of retaliatory motivation does not amount to an unreal or technical violation of his constitutional rights. On the contrary, as we recognized in *North Carolina* v. *Pearce*, 395 U. S. 711, 725 (1969), "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise" of his rights.

The Court does not contend that *Blackledge* is inapplicable to instances of pretrial as well as post-trial vindictiveness. But after examining the record before us for objective indications of such vindictiveness, the Court concludes, *ante*, at 382, that "a presumption of vindictiveness is not warranted in this case." With all respect, I disagree both with the Court's conclusion and with its reasoning. In my view, the question here is not one of "presumptions." Rather, I would analyze respondent's claim in the terms employed by our precedents. Did the elevation of the charges against respondent "pose a realistic likelihood of 'vindictiveness?'" See *Blackledge* v. *Perry*, 417 U. S., at 27. Is it possible that "the fear of such vindictiveness may unconstitutionally deter" a person in respondent's position from exercising his statutory and

constitutional right to a jury trial? See *North Carolina* v. *Pearce*, *supra*, at 725. The answer to these questions is plainly "Yes."

The Court suggests, *ante*, at 383, that the distinction between a bench trial and a jury trial is unimportant in this context. Such a suggestion is demonstrably fallacious. Experienced criminal practitioners, for both prosecution and defense, know that a jury trial entails far more prosecutorial work than a bench trial. Defense challenges to the potential-juror array, *voir dire* examination of potential jurors, and suppression hearings all take up a prosecutor's time before a jury trial, adding to his scheduling difficulties and caseload. More care in the preparation of his requested instructions, of his witnesses, and of his own remarks is necessary in order to avoid mistrial or reversible error. And there is always the specter of the "irrational" acquittal by a jury that is unreviewable on appeal. Thus it is simply inconceivable that a criminal defendant's election to be tried by jury would be a matter of indifference to his prosecutor. On the contrary, the prosecutor would almost always prefer that the defendant waive such a "troublesome" right. And if the defendant refuses to do so, the prosecutor's subsequent elevation of the charges against the defendant manifestly poses a realistic likelihood of vindictiveness.

The truth of my conclusion, and the patent fallacy of the Court's, is particularly evident on the record before us. The practical effect of respondent's demand for a jury trial was that the Government had to transfer the case from a trial before a Magistrate in Hyattsville to a trial before a District Judge and jury in Baltimore, and had to substitute one prosecutor for another. The Government thus suffered not only administrative inconvenience: It also lost the value of the preparation and services of the first prosecutor, and was forced to commit a second prosecutor to prepare the case from scratch. Thus, just as in *Blackledge*, respondent's elec-

tion had the effect of "clearly requir[ing] increased expenditures of prosecutorial resources before the defendant's conviction" could finally be achieved. 417 U. S., at 27. And, to paraphrase *Blackledge*,

> "if the prosecutor has the means readily at hand to discourage such [elections]—by 'upping the ante' through a felony indictment . . . —the State can insure that only the most hardy defendants will brave the hazards of a [jury] trial." Cf. *id.*, at 27–28.

I conclude that the facts of this case easily support the inference of "a realistic likelihood of vindictiveness."

The Court discusses *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978), *ante*, at 377–380, and suggests some analogy between that case and the present one, *ante*, at 380. In my view, such an analogy is quite inapt. *Bordenkircher* dealt only with the context of plea bargaining and with the narrow situation in which the prosecutor "openly presented the defendant with the unpleasant alternatives of forgoing trial or facing [increased] charges." 434 U. S., at 365. *Bordenkircher* did not remotely suggest that a pretrial increase in charges, made as a response to a demand for jury trial, would not present a realistic likelihood of vindictiveness when the demand put the prosecution to an added burden such as that imposed in this case. Indeed, *Bordenkircher* expressly distinguished its facts from those in *Blackledge* and *Pearce:* "In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right . . . —a situation 'very different from the give-and-take negotiation common in plea bargaining . . . .'" 434 U. S., at 362, quoting *Parker* v. *North Carolina*, 397 U. S. 790, 809 (1970). The facts in this case plainly fit within the pattern of *Pearce* and *Blackledge*, not of *Bordenkircher*. There was no ongoing "give-and-take negotiation" between respondent and the Government, and there

was the "unilateral imposition of a penalty" in response to respondent's choice "to exercise a legal right."

Because it seems clear to me that *Blackledge* requires it, I would affirm the judgment of the Court of Appeals.

CALIFORNIA ET AL. *v.* GRACE BRETHREN CHURCH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 81–31. Argued March 30, 1982—Decided June 18, 1982*

The Federal Unemployment Tax Act established a cooperative federal-state scheme to provide benefits to unemployed workers. The Act requires employers to pay an excise tax on wages paid to employees in "covered" employment, but entitles them to a credit on the federal tax for contributions paid into federally approved state unemployment compensation programs. The Act, in 26 U. S. C. § 3309(b), exempts from mandatory state coverage employees of, *inter alia*, "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches." A number of California churches and religious schools, including religious schools unaffiliated with any church, brought suit in Federal District Court to enjoin the Secretary of Labor from conditioning his approval of the California unemployment insurance program on its coverage of plaintiffs' employees, and to enjoin the State from collecting both tax information and the state unemployment compensation tax. The District Court conducted various proceedings and issued several opinions and orders extending over almost a year and a half, in one of which proceedings it rejected the Federal Government's argument that the court was barred from granting injunctive relief by the Tax Injunction Act, which provides that district courts "shall not enjoin, suspend or restrain" the assessment or collection of any state tax where "a plain, speedy and efficient remedy" may be had in the courts of such State. Ultimately, as pertinent here, on the ground that the benefit entitlement decisions for employees of the religious schools unaffiliated with churches risked excessive entanglement with religion in violation of the Establishment Clause of the First Amendment, the court permanently enjoined the state defendants from collecting unemployment taxes from such schools but did not issue an injunction against the federal defendants as to the schools because it had no information as to

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*Together with No. 81–228, *United States et al.* v. *Grace Brethren Church et al.*; and No. 81–455, *Grace Brethren Church et al.* v. *United States et al.*, also on appeal from the same court.

what response the Secretary of Labor would make to the court's conclusion that the state defendants could not constitutionally impose state unemployment taxes on the employees of such schools. The court said that if the Secretary instituted decertification proceedings against California for failing to collect the taxes on behalf of such employees, the parties could apply to the court for further relief.

Held:

1. This Court has jurisdiction to hear these appeals under 28 U. S. C. § 1252, which permits appeals to this Court from a federal-court judgment holding an Act of Congress unconstitutional in any civil action to which the United States or any of its agencies, or any officer or employee thereof, is a party. While the District Court did not expressly hold § 3309(b) unconstitutional as applied to religious schools unaffiliated with churches, the effect of its several opinions and orders was to make "the United States or its officers . . . bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, 421 U. S. 21, 31. Pp. 404–407.

2. The Tax Injunction Act deprived the District Court of jurisdiction to issue declaratory and injunctive relief. Pp. 407–419.

(a) That Act prohibits declaratory as well as injunctive relief. Because the declaratory judgment procedure "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299, the very language of the Act—"suspend or restrain" the assessment or collection of state taxes—suggests that a district court is prohibited from issuing declaratory relief in state tax cases. Moreover, because there is little practical difference between injunctive and declaratory relief, it is unlikely that Congress intended to prohibit taxpayers from seeking one form of relief, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act "to limit drastically" federal-court interference with the assessment and collection of state taxes. Pp. 407–411.

(b) A state-court remedy is "plain, speedy and efficient" within the meaning of the Tax Injunction Act only if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 514. Pp. 411–413.

(c) Here, because the taxpayers in question could seek a refund of their state unemployment insurance taxes through state administrative and judicial procedures, and thereby obtain state judicial review of their constitutional claims, their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act. There is no merit to the taxpayers' argument that the California refund procedures

did not constitute a "plain, speedy and efficient remedy" because their First Amendment claims could be effectively remedied only by injunctive relief and that such relief was unavailable in California. First, under California procedures, the taxpayers should be able to challenge the constitutionality of the unemployment tax in state court before extensive entanglement occurs, and state tax collection agencies can be expected to abide by resulting state-court rulings. Second, to the extent that any entanglement occurs before state review of the constitutional questions, that entanglement would not be reduced by seeking relief instead in the federal courts. Moreover, to carve out a special exception for taxpayers who raise First Amendment claims would undermine the Tax Injunction Act's primary purpose. Pp. 413–417.

(d) Where the District Court was without jurisdiction, this Court will not consider the merits of the taxpayers' First Amendment claims. *McLucas* v. *DeChamplain*, *supra*, and *Weinberger* v. *Salfi*, 422 U. S. 749, distinguished. Pp. 418–419.

Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 419.

Harriet S. Shapiro argued the cause for the United States et al. in Nos. 81–228 and 81–455. With her on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Wallace*, *Mark C. Rutznick*, and *F. James Foley*.

Jeffrey M. Vesely, Deputy Attorney General of California, argued the cause for appellants in No. 81–31. With him on the briefs were *George Deukmejian*, Attorney General, and *Edmond B. Mamer*, Deputy Attorney General.

William Bentley Ball argued the cause for appellees in Nos. 81–31 and 81–228 and appellants in No. 81–455. With him on the brief for Grace Brethren Church et al. were *Philip J. Murren* and *Robert L. Toms*. *Donald A. Daucher* filed a brief for the Lutheran Church-Missouri Synod et al.†

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†*Nathan Z. Dershowitz* and *Marc D. Stern* filed a brief for the American Jewish Congress as *amicus curiae*.

JUSTICE O'CONNOR delivered the opinion of the Court.

The principal question presented by the parties to these appeals is whether certain state and federal statutes violate the Establishment and Free Exercise Clauses of the First Amendment[1] by requiring religious schools unaffiliated with any church to pay unemployment insurance taxes. We do not reach this substantive question, however, holding instead that the Tax Injunction Act, 28 U. S. C. § 1341,[2] deprived the District Court of jurisdiction to hear these challenges. Accordingly, we vacate the judgment below.

I

Last Term, in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772 (1981), this Court considered statutory and constitutional challenges to provisions of the Federal Unemployment Tax Act (FUTA), 26 U. S. C. §§ 3301–3311 (1976 ed. and Supp. IV). Because the present claims involve the same provisions that we interpreted in *St. Martin*, we recount only briefly the substance and legislative history of the relevant statutes before turning to the facts in the present cases.

A

In FUTA,[3] Congress has authorized a cooperative federal-state scheme to provide benefits to unemployed workers.

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[1] The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Free Exercise and Establishment Clauses apply to the States through the Due Process Clause of the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947).

[2] The Act provides:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[3] FUTA was enacted originally as Title IX of the Social Security Act of 1935, ch. 531, 49 Stat. 639.

The Act requires employers to pay an excise tax on wages paid to employees in "covered" employment,[4] but entitles them to a credit of up to 90% of the federal tax for contributions they have paid into federally approved state unemployment compensation programs.[5] One of the requirements for federal approval is that state programs "cover" certain broad categories of employment.

Until 1970, 26 U. S. C. § 3306(c)(8) excluded from the definition of covered employment "service performed in the employ of a religious, charitable, educational, or other [tax exempt] organization." Pub. L. 86–778, § 533, 74 Stat. 984. As a consequence, such organizations were not required to pay either federal excise taxes or state unemployment compensation taxes. In 1970, Congress amended FUTA to require state plans to cover employees of nonprofit organizations, state hospitals, and state institutions of higher education, thus eliminating the broad exemption available to nonprofit organizations.[6] See § 3309(a)(1). At the same time, Congress enacted § 3309(b) to exempt from mandatory

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[4] See 26 U. S. C. § 3301.

[5] See 26 U. S. C. § 3302 (1976 ed. and Supp. IV). Each state program receives annual approval after the Secretary of Labor finds that it complies with federal statutory standards. See 26 U. S. C. §§ 3304(a), (c) (1976 ed. and Supp. IV). The federal standards for the state programs are contained in §§ 3304 and 3309. If a state plan complies with federal standards, the State is authorized to receive a federal grant to administer the state plan. See 29 U. S. C. § 49d(b); 42 U. S. C. § 501.

[6] See Employment Security Amendments of 1970, Pub. L. 91–373, § 104 (b)(1), 84 Stat. 697. Under §§ 3309(a)(2) and 3304(a)(6)(B), such nonprofit organizations were given the option of either making the same contribution to the state unemployment compensation fund required of other employers, or reimbursing the fund for unemployment compensation payments actually made to the nonprofit organizations' former employees.

Although nonprofit organizations were covered by federally approved state unemployment compensation laws, they continued to be exempt from the federal excise tax on wages because the definition of "employment" in § 3306(c)(8), excluding services performed for such organizations, remained unchanged.

state coverage a narrow class of religious and educational employees, *i. e.*, Congress exempted services performed

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education." Pub. L. 91–373, § 104(b)(1), 84 Stat. 698.

In 1976, Congress again amended FUTA, this time eliminating the substance of § 3309(b)(3), thereby removing the blanket exemption for school employees. See Unemployment Compensation Amendments of 1976, Pub. L. 94–566, § 115(b)(1), 90 Stat. 2670.[7] In order to maintain compliance with FUTA, the States promptly amended their corresponding state programs. See, *e. g.*, Cal. Un. Ins. Code Ann. §§ 634.5(a), (b) (West Supp. 1982).

B

The plaintiffs in these cases, a number of California churches and religious schools, sought to enjoin the Secretary of Labor from conditioning his approval of the California unemployment insurance program on its coverage of the plaintiffs' employees, and to enjoin the State from collecting both tax information and the state tax.[8] For the purposes of

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[7] In its place, Congress substituted an unrelated provision.

[8] This litigation grew out of two suits, one filed in the District Court by Grace Brethren Church et al. (Case No. CV 79–93 MRP), and the other filed in state court by the Lutheran Church Missouri Synod. The Secre-

evaluating their statutory and constitutional claims, the District Court divided the plaintiffs into three classes of employers: Category I represents those schools that are part of the corporate structure of a church or association of churches; Category II includes schools that are separate corporations formed by a church or association of churches; and Category III includes schools that are "operated primarily for religious purposes, but which [are] not operated, supervised, controlled or principally supported by a church or convention or association of churches, *i. e.*, an independent, non-church affiliated religious school." Supplemental Opinion, reprinted in App. to Juris. Statement in No. 81–31, p. 71 (J. S. App.).[9]

On September 21, 1979, the District Court granted a preliminary injunction against the State, restraining it from collecting the state unemployment tax from the Category I plaintiffs. See *id.*, at 51. The basis for the court's order was its conclusion that the plaintiffs were exempt from mandatory state coverage under § 3309(b)(1), and alternatively, that if they were not exempt under the terms of FUTA, collection of the tax from the plaintiffs would involve excessive governmental entanglement with religion, in violation of the Establishment Clause of the First Amendment. See J. S. App. 58–65.

In the same opinion, the District Court rejected the Federal Government's argument that, because the state remedy was "plain, speedy and efficient," the Tax Injunction Act, 28 U. S. C. § 1341, barred the court from granting injunctive relief. Considering first the availability of injunctive relief

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tary of Labor successfully removed the *Lutheran Church* case (Case No. CV 79–162 MRP) to the District Court, which consolidated the cases for trial.

[9] Category I and II schools comprise schools from the *Lutheran Church* case, see Order (filed Apr. 3, 1981), reprinted in J. S. App. 49, as well as some of the schools from the *Grace Brethren* case. See Order (filed Apr. 3, 1981), reprinted in J. S. App. 45. Category III schools include only schools from the *Grace Brethren* case. See J. S. App. 46.

from the state courts, the court concluded that state statutory and constitutional provisions[10] made such relief "at best,

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[10] California Un. Ins. Code Ann. § 1851 (West 1972) provides:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division."

California Const., Art. XIII, § 32, provides:

"No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

Despite the apparently unambiguous language of these provisions, the District Court considered the availability of injunctive relief only "uncertain" because of state decisions indicating that injunctive relief may be available when the plaintiff challenges the state tax law as being unconstitutional. See *Las Animas & San Joaquin Land Co.* v. *Preciado*, 167 Cal. 580, 587, 140 P. 239, 242 (1914) (injunction available to restrain a school district from assessing property taxes on land over which it has no authority); *Bueneman* v. *City of Santa Barbara*, 8 Cal. 2d 405, 407, 65 P. 2d 884, 886 (1937) (statutory provision precluding courts from enjoining execution of public laws for public benefit does not apply to claims that a taxing statute is unconstitutional).

More recent decisions, however, have held injunctive relief to be precluded. See *Modern Barber Colleges, Inc.* v. *California Employment Stabilization Comm'n*, 31 Cal. 2d 720, 723, 192 P. 2d 916, 918 (1948) (holding that a provision in the Unemployment Insurance Act, similar to § 1851, prohibited injunctive relief, leaving the taxpayer only with the option to pay the tax and seek a refund); *Aronoff* v. *Franchise Tax Board*, 60 Cal. 2d 177, 180, 383 P. 2d 409, 411 (1963) (holding that Cal. Const., Art. XIII, § 15, and Cal. Rev. & Tax Code Ann. § 19081 (West 1970) preclude issuance of an injunction to prevent collection of additional income taxes). Relying on *Aronoff*, a District Court of Appeal held that Cal. Const., Art. XIII, § 32 (which, in 1974, became the successor to § 15), and the corresponding statutory provision, Cal. Un. Ins. Code Ann. § 1851 (West 1972), prohibit the courts from enjoining the collection of unemployment insurance taxes. *Lorco Properties, Inc.* v. *Department of Benefit Payments*, 57 Cal. App. 3d 809, 815, 129 Cal. Rptr. 312, 315 (1976). Recently, in *Pacific Gas & Electric Co.* v. *State Board of Equalization*, 27 Cal. 3d 277, 279, 611 P. 2d 463, 464 (1980), the California Supreme Court held that under Cal. Const., Art. XIII, § 32, a taxpayer was barred from seeking relief compelling the

uncertain." J. S. App. 66. The court then concluded that a state suit for a refund was an inadequate remedy because the plaintiffs claimed not only that their property had been taken unlawfully, but also that the "very process of determining whether any tax is due at all results in a violation of their First Amendment rights." *Id.*, at 67. Because this First Amendment injury was "irreparable" once the taxes had been collected, only an injunction against collection of the tax could remedy the plaintiffs' claims. Accordingly, because there existed no "plain, speedy and efficient" remedy in the state courts, the District Court concluded that it had jurisdiction to grant injunctive and declaratory relief.

In a supplemental opinion filed June 2, 1980, the court clarified its earlier opinion, stating expressly that the preliminary injunction covered only Category I plaintiffs. See *id.*, at 71. For the same reasons that it had granted the initial preliminary injunction, however, the court extended the preliminary injunction to Category II plaintiffs. The court continued to deny relief to the Category III plaintiffs after concluding that they were not covered by the statutory exemptions in § 3309(b) and that the risk of excessive governmental entanglement with religion was too small to violate the Establishment Clause. J. S. App. 77–79.[11]

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state tax board to adjust the taxpayer's real property assessments. The court expressly held that there were no equitable exceptions to this rule, *id.*, at 282, 611 P. 2d, at 466, and reaffirmed the importance of the state policy to permit the uninterrupted collection of taxes. Cf. *Pacific Motor Transport Co.* v. *State Board of Equalization*, 28 Cal. App. 3d 230, 236, 104 Cal. Rptr. 558, 562 (1972) (noted without approval in *Pacific Gas & Electric Co.* v. *State Board of Equalization*, *supra*, and holding that a taxpayer could seek declaratory relief to challenge the validity of a tax regulation, but that such relief could not "'prevent or enjoin' or otherwise hamper present or future tax assessment or collection effort").

[11] The court also rejected the arguments offered by the Category III plaintiffs that imposition of the tax violates the Free Exercise Clause, and that the unique statutory treatment of Category III plaintiffs violates equal protection. J. S. App. 78.

Finally, on April 3, 1981, the court filed a second supplemental opinion ruling on all of the plaintiffs' motions for permanent injunctions enjoining the State from collecting unemployment compensation taxes and the Federal Government from conditioning approval of the state unemployment compensation programs on their inclusion of the plaintiffs' employees. See *id.*, at 1. Considering first the statutory claims, the court concluded that Category I and Category II schools, but not Category III schools, are exempt from coverage under 26 U. S. C. § 3309(b) and the corresponding state provision, Cal. Un. Ins. Code Ann. § 634.5(a) (West Supp. 1982). J. S. App. 3–15.[12] The court also found that the benefit entitlement decisions for employees of Category III schools risk excessive governmental entanglement with religion in violation of the Establishment Clause of the First Amendment. *Id.*, at 25–33.[13] Consequently, the court held that "constitutional considerations bar the application of the scheme" to the Category III plaintiffs. *Id.*, at 33.

Based on these findings, the court issued orders permanently enjoining the federal defendants from requiring state unemployment insurance programs to cover Category I and Category II schools as a precondition for federal approval of the state programs, *id.*, at 47, 51, and permanently enjoining

[12] The court held alternatively that if the Secretary of Labor's interpretation of § 3309(b) were correct (*i. e.*, Category I and II schools were not exempt from coverage), then that provision violated the First Amendment because it caused excessive governmental entanglement with religion by requiring "[i]ntrusive monitoring of the activities of employees of religious schools in order to determine whether or not those employees are exempt from unemployment insurance . . . taxes" and by requiring "[i]nvolvement of state officials in the resolution of questions of religious doctrine in the course of determining the benefit eligibility of discharged employees of religious schools." Order (filed Apr. 3, 1981), reprinted in J. S. App. 45, 46; Order (filed Apr. 3, 1981), reprinted in *id.*, at 49, 50.

[13] The court again rejected the plaintiffs' argument that statutory coverage of Category III schools violates the Free Exercise Clause of the First Amendment, *id.*, at 16–25, and found it unnecessary to reach the Category III plaintiffs' equal protection claim. *Id.*, at 35.

the state defendants from "collecting, or attempting to collect, unemployment compensation . . . taxes" from the Category I, II, or III schools. *Id.*, at 47, 50. The court expressly held Cal. Un. Ins. Code Ann. § 634.5(a) (West Supp. 1982) unconstitutional. See J. S. App. 45, 46. The court did not issue an injunction against the federal defendants as to Category III schools because it

> "has no information indicating what response, if any, the Secretary will make to the Court's conclusion that the state defendants may not constitutionally impose the state unemployment compensation tax scheme on the Category 3 employees of non-church affiliated schools. . . . If the Secretary, in response to failure by the state defendants to collect unemployment compensation taxes on behalf of Category 3 employees, institutes decertification proceedings against the State of California, the parties may apply to this Court for further relief." Second Supplemental Opinion, reprinted in J. S. App. 44, n. 39.

Following issuance of the court's injunction, this Court decided *St. Martin Evangelical Lutheran Church* v. *South Dakota*, holding that § 3309(b)(1)(A) exempts Category I schools from mandatory coverage under the state unemployment insurance programs. Although no Category II schools were before the Court in *St. Martin*, the Court noted in a footnote that

> "[t]o establish exemption from FUTA, a separately incorporated church school (or other organization) must satisfy the requirements of § 3309(b)(1)(B): (1) that the organization 'is operated primarily for religious purposes,' and (2) that it is 'operated, supervised, controlled, or principally supported by a church or convention or association of churches.'" 451 U. S., at 782–783, n. 12.

As a result of this opinion, the Secretary of Labor reconsidered his position and decided that both Category I and Cate-

gory II schools are statutorily exempt from mandatory coverage under FUTA. Consequently, the federal defendants, as well as the state defendants, have not appealed the District Court's injunction involving Category I and Category II schools, but only that part of the District Court order involving the Category III schools.[14]

II

An initial matter requiring our attention is whether this Court has jurisdiction to hear these appeals.[15] Congress has provided that

> "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." 28 U. S. C. § 1252.

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[14] See J. S. App. 11–12; Juris. Statement in No. 81–228, pp. 4, n. 2, 6, n. 5. The Category III schools are parties only in the *Grace Brethren* case, the suit originally filed in federal court. See n. 8, *supra*.

The *Grace Brethren* appellees filed a cross-appeal (No. 81–455) claiming that the District Court erred in holding that FUTA and the corresponding California statutory provisions do not violate the Free Exercise Clause of the First Amendment. The cross-appeal, however, is unnecessary to preserve this argument since under this Court's Rule 10.5 "an appellee, without filing a cross-appeal, [may] defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted."

The plaintiffs in the *Lutheran Church* case have filed a brief in support of the judgment below. Because, however, neither the State nor the Federal Government appealed from that part of the judgment involving the *Lutheran Church* plaintiffs, we do not address their claims.

[15] In our order setting these cases for oral argument, we postponed the question of jurisdiction until consideration of the merits. See 454 U. S. 961 (1981).

The only possible doubt regarding our appellate jurisdiction under this provision is the requirement that the District Court hold "an Act of Congress unconstitutional."

In *McLucas* v. *DeChamplain*, 421 U. S. 21 (1975), we stated that § 1252 was an unambiguous exception to the policy of minimizing the mandatory docket of this Court. Indeed, the "language of the statute sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." *Id.*, at 31. Moreover, this Court has appellate jurisdiction under § 1252 "when the ruling of unconstitutionality is made in the application of the statute to a particular circumstance, . . . rather than upon the challenged statute as a whole." *Fleming* v. *Rhodes*, 331 U. S. 100, 102–103 (1947) (discussing the predecessor to § 1252, Act of Aug. 24, 1937, 50 Stat. 751). See *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U. S. 561, 563 (1972) *(per curiam); United States* v. *Darusmont*, 449 U. S. 292, 293 (1981). Finally, § 1252 provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional, so long as a determination that a statutory provision was unconstitutional "was a necessary predicate to the relief" that the lower court granted. *United States* v. *Clark*, 445 U. S. 23, 26, n. 2 (1980).[16]

In the present case, the District Court did not expressly hold § 3309(b) of FUTA unconstitutional as applied to the Category III appellees,[17] but the effect of its several opinions

[16] In *Clark*, the Court of Claims simply ordered relief based on its earlier decision in another case. In that earlier decision, the court had declared the challenged statutory provision unconstitutional. See *Gentry* v. *United States*, 212 Ct. Cl. 1, 546 F. 2d 343 (1976), rehearing denied, 212 Ct. Cl. 27, 551 F. 2d 852 (1977).

[17] See Order (filed Apr. 3, 1981), reprinted in J. S. App. 45, 46 (holding Cal. Un. Ins. Code Ann. § 634.5(a) (West Supp. 1982) unconstitutional, but making no direct reference to § 3309(b)).

and orders was to make "the United States or its officers . . . bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, *supra*, at 31. For example, while discussing the Establishment Clause claim of the Category III schools, the District Court held:

> "Since such entanglement [involving the resolution of questions of faith and doctrine by secular tribunals] is inevitable during the benefit eligibility determination process if religious schools are brought within the scope of the unemployment compensation tax *scheme*, constitutional considerations bar the *application of the scheme* to them." Second Supplemental Opinion, reprinted in J. S. App. 33 (emphasis added).

Examination of other portions of the court's opinion makes clear that the court's use of the word "scheme" refers to the combined federal and state provisions. See, *e. g.*, *id.*, at 26 (expressly referring to both federal and state statutory provisions in discussing the "unemployment compensation scheme"); *id.*, at 25 (referring to the intent of Congress and the California Legislature in discussing the "unemployment compensation tax scheme"). Moreover, the District Court's analysis leading to its order holding the California provision unconstitutional is based solely on its understanding of the operation and effect of FUTA, which of course prompted the passage of the corresponding state statute in the first place.[18]

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[18] The court's analysis of Category I and II schools also demonstrates that it believed FUTA, as applied to Category III schools, to be unconstitutional. In its discussion of Category I and II schools, the court held that if it were to follow the Secretary's interpretation of § 3309, *i. e.*, if *no* exemption existed, then FUTA would be unconstitutional as applied to those schools in part because of the excessive governmental entanglement in the benefit eligibility hearing. See n. 12, *supra*. Since the court also found an entanglement problem with respect to benefit eligibility hearings for Category III schools, and since there is no statutory exemption for those schools, it follows that the District Court must have believed that FUTA was unconstitutional as applied to the Category III plaintiffs.

Cf. *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S., at 780, n. 9 (holding that the Court could review the South Dakota Supreme Court's interpretation of its unemployment compensation tax statute because its "analysis depended entirely on its understanding of the meaning of FUTA and the First Amendment"). Finally, in its second supplemental opinion, the court made clear that if the Secretary "institutes decertification proceedings against the State of California" for failing to collect unemployment compensation taxes on behalf of Category III employees, "the parties may apply to this Court for further relief," which can only mean injunctive relief against the Secretary. J. S. App. 44, n. 39. Under these circumstances, it is clear that the Secretary is "bound by a holding of unconstitutionality," and that this Court has jurisdiction under § 1252 to hear this appeal.

III

As we noted above, the District Court declared Cal. Un. Ins. Code Ann. § 634.5(a) (West Supp. 1982) unconstitutional and enjoined the state defendants from collecting state unemployment compensation taxes from the Category III schools.[19] In the course of granting this declaratory and injunctive relief, the court expressly rejected the Federal Government's argument that the Tax Injunction Act, 28 U. S. C. § 1341, deprived the court of jurisdiction. See J. S. App. 65–69. Consequently, before reaching the merits of the appellees' claim, we must decide whether the District Court correctly ruled that it had jurisdiction under the Tax Injunction Act to issue declaratory and injunctive relief.

A

The Tax Injunction Act states simply that the district courts "shall not enjoin, suspend or restrain the . . . col-

[19] No federal tax is involved in this case, for the services performed for Category III schools are exempted by § 3306(c)(8) from the definition of employment for which the federal excise tax must be paid.

lection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." It is plain from this language that the Tax Injunction Act prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes. Although this Court once reserved the question,[20] we now conclude that the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional.

Initially, we observe that the Act divests the district court not only of jurisdiction to issue an injunction enjoining state officials, but also of jurisdiction to take actions that "suspend or restrain" the assessment and collection of state taxes. Because the declaratory judgment "procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299 (1943), the very language of the Act suggests that a federal court is prohibited from issuing declaratory relief in state tax cases.[21] Additionally, because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act: "to limit drastically federal district court jurisdiction to interfere with so important a local concern

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[20] See *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299 (1943).

[21] In enacting the Declaratory Judgment Act, Congress recognized the substantial effect declaratory relief would have on legal disputes. Thus, while Congress perceived declaratory judgments as a device to reduce federal-court abuses associated with injunctions, Congress also recognized that declaratory relief would "settle controversies," S. Rep. No. 1005, 73d Cong., 2d Sess., 2 (1934), and permit the federal courts "the power to exercise in some instances preventive relief." H. R. Rep. No. 1264, 73d Cong., 2d Sess., 2 (1934).

as the collection of taxes." *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 522 (1981).[22] As JUSTICE BRENNAN

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[22] To be sure, in enacting the Tax Injunction Act, Congress considered primarily injunctions against state officials because that form of anticipatory relief was the principal weapon used by businesses to delay or avoid paying state taxes. See, *e. g.*, S. Rep. No. 1035, 75th Cong., 1st Sess., 1–2 (1937); 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone). Moreover, it is arguable that Congress' failure to mention the Declaratory Judgment Act, enacted only three years earlier, indicates that Congress intended the Tax Injunction Act to prohibit only federal injunctive relief. Nevertheless, the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisidiction to interfere with state tax administration.

Both the Senate and House Reports, as well as the congressional debates of the Act, expressly rely on the congressional purpose underlying the Johnson Act of 1934, 28 U. S. C. § 1342, which divests the district courts of jurisdiction of any suit to "enjoin, suspend, or restrain the operation" of any public utility commission order. See S. Rep. No. 1035, *supra*, at 2; H. R. Rep. No. 1503, 75th Cong., 1st Sess., 2 (1937); 81 Cong. Rec. 1415–1417 (1937) (remarks of Sen. Bone). The legislative history of the Johnson Act, in turn, makes clear that its purpose was to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings. See, *e. g.*, S. Rep. No. 125, 73d Cong., 1st Sess., 3 (1933) (in support of the Johnson bill, declaring that a utility "will be required, in all cases where a State has set up a public utility commission, to proceed before that commission if it has any complaint. It can appeal from this State board to the State courts and, if it is dissatisfied with the final judgment of the supreme court of the State, it can take an appeal to the Supreme Court of the United States"); *id.*, at 33 ("It is the jurisdiction which Congress has given to Federal courts to pass on matters of State regulation which holds up the laws of the States, prevents the officials of the States from doing their duty, and robs the people of the benefit which would accrue to them, if the commissions which they have set up by law in the various States were permitted to perform their duty"); H. R. Rep. No. 1194, 73d Cong., 2d Sess., 2 (1934) (in opposition to the Johnson bill, declaring that it "seeks to withdraw completely from the district courts of the United States all jurisdiction in suits relating to orders of State administrative boards or commissions affecting rates chargeable by public utilities"); 78 Cong. Rec. 1916 (1934) (remarks of Sen. Johnson); *id.*, at 1918 ("the object is to make [the utilities] subject to

stated in his opinion concurring in part and dissenting in part in *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971):

> "If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts."

See *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 108–109, n. 6 (1981).[23]

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the jurisdiction of the laws of our States; to give them their rights in every instance to the trial of the question of fact first before the public-utility commission, to give them every legal right they have, and if any right that is guaranteed by the Constitution is infringed upon at all, then, of course, the legal right of appeal ultimately from the highest tribunal in the State to the United States Supreme Court"); *id.*, at 8324 (remarks of Rep. Mapes) ("It is simply a question as to whether or not States are going to be allowed to perform their proper functions in the supervision and fixing of rates, without interference of Federal law. It is a question as to whether or not Congress is going to continue to permit the utilities in important cases to thwart the will of the States and the State authorities. . . . This bill will only deprive the lower Federal courts of the jurisdiction they now have over rate cases"); *id.*, at 8328 (remarks of Rep. Lewis) ("The Johnson bill absolutely abolishes the jurisdiction of the United States courts in rate cases"); *id.*, at 8338 (remarks of Rep. Tarver) ("The Johnson bill contains but one substantive proposition, and that is to divest the district courts of the United States of jurisdiction in public-utility rate cases"); *id.*, at 8419 (remarks of Rep. Hancock) ("the Johnson bill seeks to [save time and money] by divesting the Federal courts of all jurisdiction in public-utility cases except the right of appeal to the Supreme Court of the United States after the final decision of the State court of last resort").

[23] This Court has long recognized the dangers inherent in disrupting the administration of state tax systems. See, *e. g.*, *Dows* v. *City of Chicago*,

Consequently, because Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes, we hold that the Act prohibits declaratory as well as injunctive relief. Accordingly, the District Court in these cases was without jurisdiction to declare the California tax provision unconstitutional or to issue its injunction against state authorities unless the appellees had no "plain, speedy and efficient remedy" in the state courts.

Last Term, in *Rosewell* v. *LaSalle National Bank*, this Court had occasion to consider the meaning of the "plain, speedy and efficient" exception in the Tax Injunction Act. After reviewing previous decisions[24] and the legislative history of the Act,[25] the Court concluded that the "plain, speedy and efficient" exception requires the "state-court remedy [to meet] certain minimal *procedural* criteria." 450 U. S., at 512 (emphasis in original). In particular, a state-court remedy is "plain, speedy and efficient" only if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Id.*, at 514 (quoting *LaSalle National Bank* v. *County of Cook*, 57 Ill. 2d 318, 324, 312 N. E. 2d 252, 255–256

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11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public").

[24] See *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 74 (1976); *Hillsborough* v. *Cromwell*, 326 U. S. 620, 625 (1946); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S., at 300–301.

[25] See 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone); S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937). The Court also relied on the legislative history of the Johnson Act of 1934, 28 U. S. C. § 1342 (prohibiting federal-court interference with orders issued by state administrative agencies to public utilities), on which the Tax Injunction Act was modeled.

(1974)).[26] Applying these considerations, the *Rosewell* Court held that an Illinois tax scheme, requiring the taxpayer to pay an allegedly unconstitutional tax[27] and seek a refund through state administrative and judicial procedures, was a "plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act. In reaching this holding, the Court specifically relied on legislative Reports demonstrating congressional awareness that refunds were the exclusive remedy in many state tax systems.[28]

The holding in *Rosewell* reflects not only Congress' express command in the Tax Injunction Act, but also the historical reluctance of the federal courts to interfere with the operation of state tax systems if the taxpayer had available an adequate remedy in the state courts. As this Court stated in *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1871), long before enactment of the Tax Injunction Act:

> "No court of equity will . . . allow its injunction to issue to restrain [state officers collecting state taxes], except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, . . . before the aid of a court of equity can be invoked."[29]

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[26] See also 450 U. S., at 515, and n. 19, 517 (making clear that some opportunity to raise constitutional objections is the most important consideration); S. Rep. No. 1035, *supra*, at 2 (under the Tax Injunction Act, a "full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases").

[27] The plaintiff in *Rosewell* had claimed that requiring payment of the county property tax violated her equal protection and due process rights.

[28] See S. Rep. 1035, *supra*, at 1 (state "statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest"); H. R. Rep. No. 1503, 75th Cong., 1st Sess., 2 (1937).

[29] See also *Boise Artesian Hot and Cold Water Co.* v. *Boise City*, 213 U. S. 276, 282 (1909) (holding that "the illegality or unconstitutionality of a

In order to accommodate these concerns and be faithful to the congressional intent "to limit drastically" federal-court interference with state tax systems, we must construe narrowly the "plain, speedy and efficient" exception to the Tax Injunction Act.

With these cases and principles in mind, we turn to the California provisions to determine whether there exists a "plain, speedy and efficient" state remedy for the appellees' claim.

B

There is no dispute that appellees in the present cases can seek a refund of the California unemployment tax through state administrative and judicial procedures. Once a taxpayer has sought from, and been denied a refund by, the appropriate state agency, see Cal. Un. Ins. Code Ann. §§ 1176–1185 (West 1972 and Supp. 1982),[30] he may file an action

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state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity"); *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 488 (1913) (holding that federal courts will not enjoin the collection of unconstitutional state taxes where the taxpayer "ha[s] a plain, adequate and complete remedy" at law); *Great Lakes Dredge & Dock Co.* v. *Huffman*, *supra*, at 299 (holding that the same "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure"); *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 103 (1981) (noting that the Tax Injunction Act, "and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation").

[30] Apparently, California taxpayers cannot raise their constitutional challenges in the administrative tax refund proceeding unless an appellate court already has sustained such a challenge. See Cal. Const., Art. III, § 3.5, which provides in part that

"[a]n administrative agency . . . has no power:

"(a) To declare a statute unenforceable, or refuse to enforce a statute, on

in Superior Court for a refund of the taxes paid, raising all arguments against the validity of the tax. Cal. Un. Ins. Code Ann. § 1241 (West Supp. 1982). If the taxpayer is unsuccessful at trial, he may appeal the decision to higher state courts and ultimately seek review in this Court. Nothing in this scheme prevents the taxpayer from "rais[ing] any and all constitutional objections to the tax" in the state courts. *Rosewell* v. *LaSalle National Bank*, 450 U. S., at 514. As the Court in *Rosewell* noted, the "Act contemplates nothing more." *Id.*, at 516, n. 19.[31] Moreover, assuming that the appellees' constitutional claims are meritorious, an issue on which we express no view, there is every reason to believe that once a state appellate court has declared the tax unconstitutional the appropriate state agencies will respect that declaration. See *Pacific Motor Transport Co.* v. *State Board of Equalization*, 28 Cal. App. 3d 230, 236, 104 Cal. Rptr. 558, 562 (1972) (noting that while the "relief afforded may not 'prevent or enjoin' or otherwise hamper present or future tax assessment or collection effort . . . [i]t will be presumed that

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the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

"(b) To declare a statute unconstitutional."

[31] Significantly, the California administrative and judicial scheme for challenging a tax assessment is remarkably similar to the Illinois scheme that we upheld in *Rosewell* as "plain, speedy and efficient." See 450 U. S., at 508–509, and nn. 6, 7. In fact, the California tax scheme is more favorable to the taxpayer than the Illinois scheme in that it requires the State to pay interest on improperly collected taxes. See Cal. Un. Ins. Code Ann. § 1242 (West Supp. 1982).

This Court has not hesitated to declare a state refund provision inadequate to bar federal relief if the taxpayer's opportunity to raise his constitutional claims in the state proceedings is uncertain. In *Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946), the taxpayer could not raise his constitutional challenge in the administrative proceedings, and appeal to the state courts was discretionary with those courts. Consequently, because "there [was] such uncertainty concerning the New Jersey remedy as to make it speculative," *id.*, at 625, the Court held that the taxpayer could seek declaratory relief in federal court.

the governmental agency will respect a judicial declaration concerning a regulation's validity"). Accordingly, it appears that *Rosewell* is directly applicable to the present cases, and that the District Court had no jurisdiction to hear the appellees' claims.

The appellees contend, however, that the California refund procedures do not constitute a "plain, speedy and efficient remedy" because their claims can be remedied only by injunctive relief, and that such relief is unavailable in California courts to restrain the collection of state taxes. See n. 10, *supra*. Injunctive relief is necessary, the appellees claim, because prior to state judicial review, the employer must meet certain recordkeeping, registration, and reporting requirements, see Cal. Un. Ins. Code Ann. §§ 1085, 1086, 1088, 1092 (West 1972 and Supp. 1982), and potentially is subject to administrative benefit eligibility hearings[32] in violation of the appellees' First Amendment rights. The appellees thus fear that their constitutional rights will be violated before they have an opportunity to challenge the constitutionality of the unemployment tax scheme in state court.

This argument is unpersuasive. First, nothing in the California scheme precludes the appellees from challenging the unemployment tax before a benefit eligibility hearing is held for one of their former employees. As soon as an employer makes its first payment to the state unemployment insurance fund, it may file for a refund and, after exhausting state administrative remedies, seek a judicial determination of the constitutionality of the tax.[33] If the employer ultimately pre-

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[32] Under Cal. Un. Ins. Code Ann. § 1256 (West Supp. 1982), a former employee can collect unemployment benefits only if he has not been dismissed for "misconduct" or has not "left his most recent work voluntarily without good cause."

[33] Part of the appellees' argument for the necessity of injunctive relief rests on the premise that payments to the state fund are made only after a benefit eligibility hearing has been held. Under 26 U. S. C. §§ 3309(a)(2) and 3304(a)(6)(B), however, the States are required to give nonprofit organizations, including the appellees, the option either of making regular contributions to the state unemployment insurance fund or of reimbursing the

vails on his constitutional argument, the state taxing authorities can be expected to respect that court's holding in future administrative proceedings. See *Pacific Motor Transport Co.* v. *State Board of Equalization*, *supra*, at 236, 104 Cal. Rptr., at 562. Thus, before any entanglement from the benefit eligibility hearings occurs, the appellees should be able to challenge the constitutionality of the state unemployment insurance taxes.

Second, while an employer may be subject to some recordkeeping and reporting requirements, or even a benefit eligibility hearing, pending the resolution of its constitutional claims in state court, it will be subject to the same burdens even if it seeks relief from the federal courts. Thus, whatever harm the appellees may suffer pending resolution of their constitutional claims, that harm is not reduced by seeking relief in federal court. Stated differently, there are no apparent advantages to federal-court relief that make state-court remedies less than "plain, speedy and efficient."[34]

Finally, we must keep in mind that at the time that it passed the Tax Injunction Act, Congress was well aware that refund procedures were the sole remedy in many States for unlawfully collected taxes. See S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess., 2 (1937).[35] Carving out a special exception for tax-

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fund for payments actually made to the employers' former employees. The nonprofit organizations are not required to choose the reimbursement method, however, and can make regular payments to the fund in advance of any employee being discharged.

[34] Our conclusion that the state-court remedy is plain, speedy and efficient is reenforced by our observation that it took the appellees in these cases over two years to obtain injunctive relief in federal court.

[35] The dissent errs when it states, without authority, that the Tax Injunction Act is not applicable to these cases because of the "layers of review that must be exhausted in the California system." *Post*, at 422, n. 4. Certainly, nothing in the legislative history of the Act suggests that requiring a taxpayer to seek a refund first through administrative procedures makes the state remedy less than "plain, speedy and efficient." More-

payers raising First Amendment claims would undermine significantly Congress' primary purpose "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell* v. *LaSalle National Bank*, 450 U. S., at 522.[36] Because we do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available, we decline to find an exception in the Tax Injunction Act for the appellees' claims.[37] Accordingly, because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial review of their constitutional claims, we hold that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act, and consequently, that the District Court had no jurisdiction to issue injunctive or declaratory relief.[38]

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over, the legislative history of the Johnson Act, after which the Tax Injunction Act was modeled, see n. 22, *supra*, makes clear congressional intent that a state remedy is "plain, speedy and efficient" even though a utility must proceed first through administrative and then judicial proceedings in order to challenge the constitutionality of utility rates. See S. Rep. No. 125, 73d Cong., 1st Sess., 2–3 (1933).

[36] In addition, there seems to be no principled basis for limiting the appellees' argument to First Amendment claims. Any employer required to pay state taxes in a manner allegedly violating the Equal Protection Clause, for example, might argue that the absence of state injunctive relief permitted the infliction of an irreparable injury that could be remedied only by a federal injunction.

[37] We also reject the appellees' argument to the extent that it assumes that the state courts will not protect their constitutional rights. As we stated in another context: "[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone* v. *Powell*, 428 U. S. 465, 494, n. 35 (1976).

[38] The state defendants also argue that because the Federal Government is an indispensable party to this action, and could not be compelled to submit to state-court jurisdiction, the state courts could not afford the appel-

C

Despite the absence of jurisdiction in the District Court, the federal defendants urge us to consider the merits of the appellees' First Amendment claims because of the "public interest in, and the Secretary's need for, a definitive interpretation of 26 U. S. C. § 3309(b)." Brief for United States 21. The Government bases this argument on our decision in *McLucas* v. *DeChamplain*, 421 U. S., at 32, in which we held that "whether the District Court did or did not have jurisdiction to act, this case is properly here under § 1252." See also *Weinberger* v. *Salfi*, 422 U. S. 749, 763, n. 8 (1975).

The Government's argument is unavailing, however, for in *McLucas* and *Salfi*, *some* federal trial court had jurisdiction,[39]

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lees complete relief. Consequently, the state defendants reason, the Tax Injunction Act does not deprive the District Court of jurisdiction. See Brief for Appellants State of California et al. 35. The error in this argument is its premise; as *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772 (1981), demonstrates, the Federal Government need not be a party in order for the appellees to litigate their statutory and constitutional claims.

Finally, none of the parties suggests that we avoid the jurisdictional bar of the Tax Injunction Act by restricting our review to the appellees' challenge to 26 U. S. C. § 3309(b), and disregarding their challenge to the corresponding state provisions, §§ 634.5(a), (b). Such a suggestion would be untenable since, after all, the state provisions were enacted in order to comply with federal statutory requirements, and consequently are identically worded to the federal provisions. Thus, a challenge to FUTA would be a direct effort to "enjoin, suspend or restrain" state tax officials from collecting unemployment taxes from the appellees. Alternatively, if the challenge to FUTA would not affect the actions of state officials, there would be serious doubts whether the appellees were injured by FUTA's provisions. Accordingly, we vacate not only the District Court's judgment with respect to the appellees' state claims, but also its judgment regarding the constitutionality of FUTA.

[39] In both of those cases, the question was whether a single district judge or a three-judge district court had jurisdiction. In the present cases, by contrast, the issue is whether the federal courts or the state courts have jurisdiction.

whereas in the present cases, no federal district court had jurisdiction. If this Court were nonetheless to reach the First Amendment issues presented in these appeals, the litigants would have sidestepped neatly Congress' intent and our long-standing policy "to limit drastically" federal interference in the administration of state taxes when a "plain, speedy and efficient" state remedy is available.[40] Accordingly, we do not reach the appellees' First Amendment claims.

The judgment of the District Court is vacated, and the cases are remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Appellee Grace Brethren Church filed suit against the United States Secretary of Labor and other defendants in the United States District Court for the Central District of California claiming that the Federal Unemployment Tax Act violates the First Amendment to the Federal Constitution. The District Court held the Act unconstitutional. Pursuant to a federal statute providing for expedited review in cases of this kind,[1] the defendants appealed directly to this Court, by-

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[40] Similarly, the state defendants' reliance on *Williams* v. *Zbaraz*, 448 U. S. 358 (1980), is misplaced. In that case, the District Court had held unconstitutional a federal statute that the parties had not challenged. We held that because there was no case or controversy on that issue, the District Court had exceeded its jurisdiction for that issue. *Id.*, at 367. Nevertheless, because of the holding of unconstitutionality we concluded that we had jurisdiction under § 1252 to "review the 'whole case.'" *Id.*, at 368. That review, however, was restricted to those issues over which the District Court had had jurisdiction, and we vacated that portion of the judgment holding the federal statute unconstitutional. *Ibid.*

[1] Title 28 U. S. C. § 1252 provides:

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . hold-

passing the Court of Appeals precisely as Congress intended. Recognizing the need for prompt review of a constitutional question affecting the nationwide operation of a federal statute, the Court holds that this special jurisdiction was properly invoked. It then reaches the curious conclusion that, because some of the defendants are California taxing authorities that administer this cooperative federal-state program in that State, Congress intended that only *state* courts could pass on the constitutional validity of this *federal* statute.[2] Neither the language nor the legislative history of the Tax Injunction Act requires such a strange result.

The Tax Injunction Act provides that federal district courts "shall not enjoin, suspend, or restrain" the activities of state taxing authorities. The preclusion of federal injunctive relief was a response to a specific problem that concerned Congress in 1937. In the States in which taxpayers were required to challenge a tax assessment in a refund suit, only taxpayers that could sue state taxing authorities in federal court could obtain injunctive relief. The privileged taxpayers were primarily the foreign corporations that could invoke federal diversity jurisdiction. These federal suits were objectionable not only because of this discrimination but also because state treasuries often were deprived of tax revenues while the federal suits were adjudicated and because the federal suits involved only state-law questions that were more appropriate for state-court resolution. See S. Rep. No. 1035, 75th Cong., 1st Sess., 1–2 (1937); 81 Cong. Rec. 1416–1417 (1937) (Sen. Bone); see also *Rosewell* v. *LaSalle*

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ing an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

[2] A further irony is that the Secretary of Labor, who is certainly the principal defendant even if not an indispensable party, could remove such an action if it were filed in state court. Indeed, with respect to one of the actions consolidated in the District Court, the Secretary did just that.

National Bank, 450 U. S. 503, 533 (STEVENS, J., dissenting).

A literal reading of the Tax Injunction Act manifestly does not preclude the declaratory judgment entered in this litigation. Nor do the concerns that gave rise to its enactment require such a bar. Appellees' challenge is based on the Federal Constitution and is directed at a federal-state program administered according to federal requirements. Only federal questions are involved.

In *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, the Court recognized that equitable considerations can in some cases provide adequate justification for federal courts to withhold declaratory relief when the Tax Injunction Act precluded injunctive relief. In the intervening 40 years, this equitable doctrine has been sufficient to protect state tax laws from unnecessary federal interference. Today, however, the Court confronts a situation in which the challenge to a state tax does not implicate these concerns.[3] Ironically, the absence in these unusual cases of the traditional justification for a ban on declaratory relief seems to spur the Court to revise the Tax Injunction Act to preclude declaratory as well as injunctive relief. To accomplish this revision, the Court must ignore the plain meaning of the statute and the limited concerns that gave rise to its enactment. The Court instead relies upon the legislative history of the Johnson Act, ch. 283, 48 Stat. 775, see *ante*, at 409–410, n. 22, even though that statute was enacted before the Declaratory Judgment Act, ch. 512, 48 Stat. 955. Even if that suspect analysis could be overlooked, the fact remains that, after the Declaratory Judgment Act was on the books for three years, Congress did not see fit to bar declaratory relief when it expressly precluded injunctive relief in the Tax Injunction Act. The avoidance of

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[3] Indeed, to the extent that equitable considerations are implicated they favor the procedure followed in these cases whereby expedited review in this Court is available.

a decision on the merits in this litigation hardly seems worth the Court's nimble exercise in lawmaking.[4]

The Court has both the power and the duty to decide the merits. I therefore respectfully dissent.

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[4]There is an independent reason why the Tax Injunction Act does not preclude federal declaratory relief in this litigation. When one compares the layers of review that must be exhausted in the California system with the direct appeal to this Court provided by 28 U. S. C. § 1252, one surely cannot conclude that the state system provides the "plain, speedy and efficient" remedy that Congress intended for the resolution of the federal questions these cases present.

MIDDLESEX COUNTY ETHICS COMMITTEE *v.* GARDEN STATE BAR ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81–460. Argued March 31, 1982—Decided June 21, 1982

Under rules promulgated by the New Jersey Supreme Court pursuant to its authority under the State Constitution to license and discipline attorneys admitted to practice in the State, a claim of unethical conduct by an attorney is first considered by a local District Ethics Committee appointed by the Supreme Court. If a complaint is issued, the attorney whose conduct is challenged is served with the complaint and has 10 days to answer. Upon a determination that a prima facie case of unethical conduct exists, a formal hearing is held. The attorney charged may have counsel, discovery is available, and all witnesses are sworn. The Committee may ultimately dismiss the complaint, issue a private letter of reprimand, or forward a presentment to the statewide Disciplinary Review Board, which is also appointed by the Supreme Court. After a *de novo* review, the Board is required to make formal findings and recommendations to the Supreme Court, which reviews all decisions beyond a private reprimand and which permits briefing and oral argument for cases involving disbarment or suspension for more than one year. Respondent Hinds, a member of the New Jersey Bar, was served by petitioner, a local Ethics Committee, with a formal statement of charges of violating certain Supreme Court disciplinary rules. Instead of filing an answer to the charges, Hinds and the three respondent organizations of lawyers filed suit in Federal District Court, contending that the disciplinary rules violated their rights under the Federal Constitution. The court dismissed the complaint on the basis of the abstention principles of *Younger* v. *Harris*, 401 U. S. 37. The Court of Appeals reversed on the ground that the disciplinary proceedings did not provide a meaningful opportunity to adjudicate constitutional claims, notwithstanding an affidavit stating that the New Jersey Supreme Court would directly consider Hinds' constitutional challenges and would consider whether such a procedure should be made explicit in the Supreme Court rules.

Held: The federal courts should abstain from interfering with the ongoing disciplinary proceedings within the jurisdiction of the New Jersey Supreme Court. Pp. 431–437.

(a) The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved.

Where such interests are involved, a federal court should abstain unless state law clearly bars the interposition of the constitutional claims. The pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. Pp. 431–432.

(b) The New Jersey Supreme Court considers its disciplinary proceedings, beginning with the filing of a complaint with the local Ethics Committee, as "judicial in nature." As such, the proceedings are of a character to warrant federal-court deference. Pp. 432–434.

(c) The State has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. The State's interest in the present litigation is demonstrated by the fact that petitioner, an agency of the New Jersey Supreme Court, is the named defendant in the present suit and was the body which initiated the state proceedings against Hinds. The importance of the state interest in the pending state judicial proceedings and in the federal case calls *Younger* abstention into play. Pp. 434–435.

(d) In light of the unique relationship between the New Jersey Supreme Court and the local Ethics Committee, and in view of the nature of the proceedings, it cannot be concluded that there was no "adequate opportunity" for Hinds to raise his constitutional claims. Any doubt as to this matter was laid to rest by the New Jersey Supreme Court's subsequent actions when, prior to the filing of the petition for certiorari in this Court, it *sua sponte* entertained the constitutional issues raised by Hinds. And there is no reason to disturb the District Court's unchallenged findings that there was no bad faith or harassment on petitioner's part and that the state disciplinary rules were not "flagrantly and patently" unconstitutional. Nor have any other extraordinary circumstances been presented to indicate that abstention would not be appropriate. Pp. 435–437.

643 F. 2d 119 and 651 F. 2d 154, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 438. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 438.

Mary Ann Burgess, Assistant Attorney General of New Jersey, argued the cause for petitioner. With her on the briefs were *Irwin I. Kimmelman*, Attorney General, *James R. Zazzali*, former Attorney General, *Erminie L. Conley* and *James J. Ciancia*, Assistant Attorneys General, and

Richard M. Hluchan and *Jaynee LaVecchia*, Deputy Attorneys General.

Morton Stavis argued the cause for respondents. With him on the brief were *Bernard K. Freamon* and *Louise Halper.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a federal court should abstain from considering a challenge to the constitutionality of disciplinary rules that are the subject of pending state disciplinary proceedings within the jurisdiction of the New Jersey Supreme Court. 454 U. S. 962 (1981). The Court of Appeals held that it need not abstain under *Younger* v. *Harris*, 401 U. S. 37 (1971). We reverse.

I

A

The Constitution of New Jersey charges the State Supreme Court with the responsibility for licensing and disciplining attorneys admitted to practice in the State. Art. 6, §2, ¶3.[1] Under the rules established by the New Jersey Supreme Court, promulgated pursuant to its constitutional authority, a complaint moves through a three-tier procedure. First, local District Ethics Committees appointed by the

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*Briefs of *amici curiae* urging affirmance were filed by *Charles S. Sims* and *Arthur N. Eisenberg* for the American Civil Liberties Union; and by *Max D. Stern* for the National Alliance Against Racist and Political Repression.

Jack Greenberg, *James M. Nabrit III*, *Charles Stephen Ralston*, and *Bill Lann Lee* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae*.

[1] Article 6, §2, ¶3, provides:

"The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

State Supreme Court are authorized to receive complaints relating to claimed unethical conduct by an attorney. New Jersey Court Rule 1:20–2(d). At least two of the minimum of eight members of the District Ethics Committee must be nonattorneys. Complaints are assigned to an attorney member of the Committee to report and make a recommendation. Rule 1:20–2(h). The decision whether to proceed with the complaint is made by the person who chairs the Ethics Committee. If a complaint is issued by the Ethics Committee it must state the name of the complainant, describe the claimed improper conduct, cite the relevant rules, and state, if known, whether the same or a similar complaint has been considered by any other Ethics Committee. The attorney whose conduct is challenged is served with the complaint and has 10 days to answer.[2]

Unless good cause appears for referring the complaint to another Committee member, each complaint is referred to the member of the Committee who conducted the initial investigation for review and further investigation, if necessary. The Committee member submits a written report stating whether a prima facie indication of unethical or unprofessional conduct has been demonstrated. The report is then evaluated by the chairman of the Ethics Committee to determine whether a prima facie case exists. Absent a prima facie showing, the complaint is summarily dismissed. If a prima facie case is found, a formal hearing on the complaint is held before three or more members of the Ethics Committee,

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[2] For a more detailed explanation of the disciplinary procedure of the District Ethics Committees, see Rule 1:20–2. As noted below, the procedure, as amended in 1981, now provides that a charged attorney may raise constitutional questions in the District Committees. Any constitutional challenges are to be set forth in the answer to the complaint. Rule 1:20–2(j) now provides:

"All constitutional questions shall be withheld for consideration by the Supreme Court as part of its review of the final decision of the Disciplinary Review Board. Interlocutory relief may be sought only in accordance with R. 1:20–4(d)(i)."

a majority of whom must be attorneys. The lawyer who is charged with unethical conduct may have counsel, discovery is available, and all witnesses are sworn. The panel is required to prepare a written report with its findings of fact and conclusions. The full Committee, following the decision of the panel, has three alternatives. The Committee may dismiss the complaint, prepare a private letter of reprimand, or prepare a presentment to be forwarded to the Disciplinary Review Board. Rule 1:20–2(o).[3]

The Disciplinary Review Board, a statewide board which is also appointed by the Supreme Court, consists of nine members, at least five of whom must be attorneys and at least three of whom must be nonattorneys. The Board makes a *de novo* review. Rule 1:20–3(d)(3).[4] The Board is required to make formal findings and recommendations to the New Jersey Supreme Court.

All decisions of the Disciplinary Review Board beyond a private reprimand are reviewed by the New Jersey Supreme Court. Briefing and oral argument are available in the Supreme Court for cases involving disbarment or suspension for more than one year. Rule 1:20–4.

B

Respondent Lennox Hinds, a member of the New Jersey Bar, served as executive director of the National Conference of Black Lawyers at the time of his challenged conduct. Hinds represented Joanne Chesimard in a civil proceeding challenging her conditions of confinement in jail. In 1977

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[3] Each District Ethics Committee appoints one member of the bar to serve as Secretary. The Secretary maintains records of the proceedings. The Secretary also transmits copies of all documents filed to the Division of Ethics and Professional Services. Rule 1:20–2(c).

[4] Subsequent to the initiation of the disciplinary hearing involved in this case, Rule 1:20–3(e) was amended to provide:

"Constitutional challenges to the proceedings not raised before the District Committee shall be preserved, without Board action, for Supreme Court consideration as part of its review of the matter on the merits. Interlocutory relief may be sought only in accordance with Rule 1:20–4(d)(i)."

Chesimard went to trial in state court for the murder of a policeman. Respondent Hinds was not a counsel of record for Chesimard in the murder case. However, at the outset of the criminal trial Hinds took part in a press conference, making statements critical of the trial and of the trial judge's judicial temperament and racial insensitivity. In particular, Hinds referred to the criminal trial as "a travesty," a "legalized lynching," and "a kangaroo court."

One member of the Middlesex County Ethics Committee read news accounts of Hinds' comments and brought the matter to the attention of the Committee. In February 1977 the Committee directed one of its members to conduct an investigation. A letter was written to Hinds, who released the contents of the letter to the press. The Ethics Committee on its own motion then suspended the investigation until the conclusion of the Chesimard criminal trial.

After the trial was completed the Committee investigated the complaint and concluded that there was probable cause to believe that Hinds had violated DR 1–102(A)(5) of the Disciplinary Rules of the Code of Professional Responsibility.[5] That section provides that "[a] lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice." Respondent Hinds also was charged with violating DR 7–107(D), which prohibits extrajudicial statements by lawyers associated with the prosecution or defense of a criminal matter.[6] The Committee then served a formal statement of charges on Hinds.

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[5] The Disciplinary Rules of the Code of Professional Responsibility and Code of Judicial Conduct of the American Bar Association, with amendment and supplementation, have been adopted by the New Jersey Supreme Court as the applicable standard of conduct for members of the bar and the judges of New Jersey. New Jersey Court Rule 1:14.

[6] DR 7–107 deals with "Trial Publicity" and states:

"(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that he expects to be disseminated by means of public communication and

Instead of filing an answer to the charges in accordance with the New Jersey Bar disciplinary procedures, Hinds and the three respondent organizations filed suit in the United States District Court for the District of New Jersey contending that the disciplinary rules violated respondents' First Amendment rights. In addition, respondents charged that the disciplinary rules were facially vague and overbroad. The District Court granted petitioner's motion to dismiss based on *Younger* v. *Harris*, 401 U. S. 37 (1971), concluding that "[t]he principles of comity and federalism dictate that the federal court abstain so that the state is afforded the opportunity to interpret its rules in the face of a constitutional challenge." App. to Pet. for Cert. 53a–54a. At respondents' request the District Court reopened the case to allow respondents an opportunity to establish bad faith, harassment, or other extraordinary circumstance which would constitute an exception to *Younger* abstention. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). After two days of hearings the District Court found no evidence to justify an exception to the *Younger* abstention doctrine and dismissed the federal-court complaint.

A divided panel of the United States Court of Appeals for the Third Circuit reversed on the ground that the state bar disciplinary proceedings did not provide a meaningful opportunity to adjudicate constitutional claims. 643 F. 2d 119 (1981). The court reasoned that the disciplinary proceedings in this case are unlike the state judicial proceedings to which the federal courts usually defer. The Court of Appeals majority viewed the proceedings in this case as administrative, "nonadjudicative" proceedings analogous to the preindictment stage of a criminal proceeding.[7]

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that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial . . . ."

[7] The majority concluded that the hearings are designed to elicit facts, not legal arguments, as indicated by the presence of nonlawyers. The court also found that the ability to raise constitutional claims before the

On petition for rehearing petitioner attached an affidavit from the Clerk of the New Jersey Supreme Court which stated that the New Jersey Supreme Court would directly consider Hinds' constitutional challenges and that the court would consider whether such a procedure should be made explicit in the Supreme Court rules. On reconsideration a divided panel of the Third Circuit declined to alter its original decision, stating that the relevant facts concerning abstention are those that existed at the time of the District Court's decision. 651 F. 2d 154 (1981).[8]

Pending review in this Court, the New Jersey Supreme Court has heard oral arguments on the constitutional challenges presented by respondent Hinds and has adopted a rule allowing for an aggrieved party in a disciplinary hearing to

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Ethics Committee does not constitute a meaningful opportunity to have constitutional questions adjudicated. No formal opinion is filed by the District Ethics Committee. The Third Circuit distinguished *Gipson* v. *New Jersey Supreme Court*, 558 F. 2d 701 (CA3 1977), on the ground that in *Gipson* the attorney being disciplined was already subject to the state-court action at the time the federal proceeding had been initiated.

Judge Adams, concurring, emphasized that state courts have the primary responsibility to discipline their bar and, in general, the federal judiciary is to exercise no supervisory powers. Judge Weis, dissenting, argued that respondents have full opportunity in the New Jersey proceedings to raise constitutional issues, concluding that the disciplinary proceedings are not a series of separate segments before independent bodies but are part of a whole. Judge Weis also concluded that there was nothing to prevent the Ethics Committee from considering constitutional claims.

[8] The panel majority noted that no rule existed at the time of the District Court's decision to assure the Court of Appeals that the New Jersey Supreme Court would consider the constitutional claims. The court also concluded that the possibility of a formal procedure of the New Jersey court for consideration of constitutional claims does not moot this case because the underlying dispute as to the validity of the rules still remains. Judge Weis, again dissenting, concluded that no justiciable controversy remained as to the issue in the Court of Appeals and recommended that the case be remanded and dismissed as moot.

seek interlocutory review of a constitutional challenge to the proceedings.[9]

II

A

Younger v. *Harris*, *supra*, and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying *Younger* abstention have been frequently reiterated by this Court. The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*, at 44.[10] Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.

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[9] Rule 1:20–4(d) states:

"(i) Interlocutory Review. An aggrieved party may file a motion for leave to appeal with the Supreme Court to seek interlocutory review of a constitutional challenge to proceedings pending before the District Ethics Committee or the Disciplinary Review Board. The motion papers shall conform to R. 2:8–1. Leave to appeal may be granted only when necessary to prevent irreparable injury. If leave to appeal is granted, the record below may, in the discretion of the Court, be supplemented by the filing of briefs and oral argument.

"(ii) Final Review. In any case in which a constitutional challenge to the proceedings has been properly raised below and preserved pending review of the merits of the disciplinary matter by the Supreme Court, the aggrieved party may, within 10 days of the filing of the report and recommendation of the Disciplinary Review Board, seek the review of the Court by proceeding in accordance with the applicable provisions of R. 1:19–8."

[10] *Samuels* v. *Mackell*, 401 U. S. 66 (1971), concluded that the same comity and federalism principles govern the issuance of federal-court declaratory judgments concerning the state statute that is the subject of the ongoing state criminal proceeding.

The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. *Moore* v. *Sims*, 442 U. S. 415, 423 (1979); *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 604–605 (1975). The importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature, as in *Huffman*, *supra*. Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation. *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Juidice* v. *Vail*, 430 U. S. 327 (1977). Where vital state interests are involved, a federal court should abstain "unless state law clearly bars the interposition of the constitutional claims." *Moore*, 442 U. S., at 426. "[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims . . . ." *Id.*, at 430. See also *Gibson* v. *Berryhill*, 411 U. S. 564 (1973).

The question in this case is threefold: *first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

B

The State of New Jersey, in common with most States,[11] recognizes the important state obligation to regulate persons

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[11] See M. Shoaf, State Disciplinary Enforcement Systems Structural Survey (ABA National Center for Professional Responsibility 1980).

The New Jersey allocation of responsibility is consistent with § 2.1 of the ABA Standards for Lawyer Discipline and Disability Proceedings (Proposed Draft 1978), which states that the "[u]ltimate and exclusive responsibility within a state for the structure and administration of the lawyer discipline and disability system and the disposition of individual cases is within the inherent power of the highest court of the state."

who are authorized to practice law. New Jersey expresses this in a state constitutional provision vesting in the New Jersey Supreme Court the authority to fix standards, regulate admission to the bar, and enforce professional discipline among members of the bar. N. J. Const., Art. 6, § 2, ¶ 3. The Supreme Court of New Jersey has recognized that the local District Ethics Committees act as the arm of the court in performing the function of receiving and investigating complaints and holding hearings. Rule 1:20–2; *In re Logan*, 70 N. J. 222, 358 A. 2d 787 (1976). The New Jersey Supreme Court has made clear that filing a complaint with the local Ethics and Grievance Committee "is in effect a filing with the Supreme Court . . . ." *Toft* v. *Ketchum*, 18 N. J. 280, 284, 113 A. 2d 671, 674, cert. denied, 350 U. S. 887 (1955). "From the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee."[12] 18 N. J., at 284, 113 A. 2d, at 674. It is clear beyond doubt that the New Jersey Supreme Court considers its bar disciplinary proceedings as "ju-

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The rationale for vesting responsibility with the judiciary is that the practice of law "is so directly connected and bound up with the exercise of judicial power and the administration of justice that the right to define and regulate it naturally and logically belongs to the judicial department." *Id.*, commentary to § 2.1.

[12] The New Jersey Supreme Court has concluded that bar disciplinary proceedings are neither criminal nor civil in nature, but rather are *sui generis*. *In re Logan*, 70 N. J. 222, 358 A. 2d 787 (1976). See also ABA Standards for Lawyer Discipline and Disability Proceedings § 1.2 (Proposed Draft 1978). As recognized in *Juidice* v. *Vail*, 430 U. S. 327 (1977), however, whether the proceeding "is labeled civil, quasi-criminal, or criminal in nature," the salient fact is whether federal-court interference would unduly interfere with the legitimate activities of the state. *Id.*, at 335–336.

The instant case arose before the 1978 rule change. In 1978 the New Jersey Supreme Court established a Disciplinary Review Board charged with review of findings of District Ethics Committees. Nothing in this rule change, however, altered the nature of such proceedings. The responsibility under Art. 6, § 2, ¶ 3, remains with the New Jersey Supreme Court.

dicial in nature."[13] As such, the proceedings are of a character to warrant federal-court deference. The remaining inquiries are whether important state interests are implicated so as to warrant federal-court abstention and whether the federal plaintiff has an adequate opportunity to present the federal challenge.

C

The State of New Jersey has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. States traditionally have exercised extensive control over the professional conduct of attorneys. See n. 11, *supra*. The ultimate objective of such control is "the protection of the public, the purification of the bar and the prevention of a re-occurrence." *In re Baron*, 25 N. J. 445, 449, 136 A. 2d 873, 875 (1957). The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice. See *In re Stein*, 1 N. J. 228, 237, 62 A. 2d 801, 805 (1949), quoting *In re Cahill*, 66 N. J. L. 527, 50 A. 119 (1901). The State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance. Finally, the State's interest in the present litigation is demonstrated by the fact that the Middlesex County Ethics Committee, an agency of the Supreme Court of New Jersey, is the named defendant in the present

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[13] The role of local ethics or bar association committees may be analogized to the function of a special master. *Anonymous* v. *Association of Bar of City of New York*, 515 F. 2d 427 (CA2), cert. denied, 423 U. S. 863 (1975). The essentially judicial nature of disciplinary actions in New Jersey has been recognized previously by the federal courts. In *Gipson* v. *New Jersey Supreme Court*, 558 F. 2d 701 (1977), the United States Court of Appeals for the Third Circuit agreed that "incursions by federal courts into ongoing [New Jersey] disciplinary proceedings would be peculiarly disruptive of notions of comity." *Id.*, at 704.

suit and was the body which initiated the state proceedings against respondent Hinds.

The importance of the state interest in the pending state judicial proceedings and in the federal case calls *Younger* abstention into play. So long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain.

D

Respondent Hinds contends that there was no opportunity in the state disciplinary proceedings to raise his federal constitutional challenge to the disciplinary rules. Yet Hinds failed to respond to the complaint filed by the local Ethics Committee and failed even to *attempt* to raise any federal constitutional challenge in the state proceedings. Under New Jersey's procedure, its Ethics Committees constantly are called upon to interpret the state disciplinary rules. Respondent Hinds points to nothing existing at the time the complaint was brought by the local Committee to indicate that the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees. Abstention is based upon the theory that "'[t]he accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.'" *Younger* v. *Harris*, 401 U. S., at 45, quoting *Fenner* v. *Boykin*, 271 U. S. 240, 244 (1926).

In light of the unique relationship between the New Jersey Supreme Court and the local Ethics Committee, and in view of the nature of the proceedings, it is difficult to conclude that there was no "adequate opportunity" for respondent Hinds

to raise his constitutional claims.[14] *Moore*, 442 U. S., at 430.

Whatever doubt, if any, that may have existed about respondent Hinds' ability to have constitutional challenges heard in the bar disciplinary hearings was laid to rest by the subsequent actions of the New Jersey Supreme Court. Prior to the filing of the petition for certiorari in this Court the New Jersey Supreme Court *sua sponte* entertained the constitutional issues raised by respondent Hinds. Respondent Hinds therefore has had abundant opportunity to present his constitutional challenges in the state disciplinary proceedings.[15]

There is no reason for the federal courts to ignore this subsequent development. In *Hicks* v. *Miranda*, 422 U. S. 332 (1975), we held that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court, the principles of *Younger* v. *Harris* should apply in full force." *Id.*, at 349. An analogous situation is presented here; the principles of comity and federalism which call for abstention remain in full

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[14] This case is distinguishable from *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974), in which there was no ongoing state proceeding to serve as a vehicle for vindicating the constitutional rights of the federal plaintiff. This case is also distinguishable from *Gerstein* v. *Pugh*, 420 U. S. 103, 108, n. 9 (1975), in which the issue of the legality of a pretrial detention could not be raised in defense of a criminal prosecution. See also *Juidice* v. *Vail*, 430 U. S., at 337.

[15] In addition, after the filing of the writ of certiorari the New Jersey Supreme Court amended the state bar disciplinary rules to expressly permit a motion directly to the New Jersey Supreme Court for interlocutory adjudication of constitutional issues. Rule 1:20–4(d)(i). See n. 9, *supra*. Even if interlocutory review is not granted, constitutional issues are preserved for consideration by the New Jersey Supreme Court. Rule 1:20–2(j).

The New Jersey Supreme Court reviews all disciplinary actions except the issuance of private letters of reprimand. Rule 1:20–4. Rule 1:20–2(j), however, requires that all constitutional issues be withheld for consideration by the Supreme Court as part of its review of the decision of the Disciplinary Review Board. This appears to provide for Supreme Court review of constitutional challenges even when a private reprimand is made.

force. Thus far in the federal-court litigation the sole issue has been whether abstention is appropriate. No proceedings have occurred on the merits and therefore no federal proceedings on the merits will be terminated by application of *Younger* principles. It would trivialize the principles of comity and federalism if federal courts failed to take into account that an adequate state forum for all relevant issues has clearly been demonstrated to be available prior to any proceedings on the merits in federal court. 422 U. S., at 350.[16]

Respondents have not challenged the findings of the District Court that there was no bad faith or harassment on the part of petitioner and that the state rules were not "'flagrantly and patently'" unconstitutional. *Younger*, *supra*, at 53, quoting *Watson* v. *Buck*, 313 U. S. 387, 402 (1941). See App. to Pet. for Cert. 50a–52a. We see no reason to disturb these findings, and no other extraordinary circumstances have been presented to indicate that abstention would not be appropriate.[17]

III

Because respondent Hinds had an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," *Gibson* v. *Berryhill*, 411 U. S., at 577, and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings. Accordingly, the judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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[16] Indeed, the decision of the New Jersey Supreme Court to consider respondent Hinds' constitutional challenges indicates that the state court desired to give Hinds a swift judicial resolution of his constitutional claims.

[17] It is not clear whether the Court of Appeals decided whether abstention would be proper as to the respondent organizations who are not parties to the state disciplinary proceedings. We leave this issue to the Court of Appeals on remand.

JUSTICE BRENNAN, concurring in the judgment.

For the reasons stated by JUSTICE MARSHALL, I join the judgment in this case. I agree that federal courts should show particular restraint before intruding into an ongoing disciplinary proceeding by a state court against a member of the State's bar, where there is an adequate opportunity to raise federal issues in that proceeding. The traditional and primary responsibility of state courts for establishing and enforcing standards for members of their bars and the quasi-criminal nature of bar disciplinary proceedings, *In re Ruffalo*, 390 U. S. 544, 551 (1968), call for exceptional deference by the federal courts. See *Gipson* v. *New Jersey Supreme Court*, 558 F. 2d 701, 703–704 (CA3 1977); *Erdmann* v. *Stevens*, 458 F. 2d 1205, 1209–1210 (CA2 1972). I continue to adhere to my view, however, that *Younger* v. *Harris*, 401 U. S. 37 (1971), is in general inapplicable to civil proceedings. See *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 613 (1975) (BRENNAN, J., dissenting).

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I agree with much of the general language in the Court's opinion discussing the importance of the State's interest in regulating the professional conduct of its attorneys. However, I believe that the question whether *Younger* abstention would have been appropriate at the time that the District Court or the Court of Appeals considered this issue is not as simple as the Court's opinion might be read to imply. As the Court acknowledges, absent an ongoing judicial proceeding in which there is an adequate opportunity for a party to raise federal constitutional challenges, *Younger* is inapplicable. *Ante*, at 432. See also *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973). Here, it is unclear whether, at the time the lower courts addressed this issue, there was an adequate opportunity in the state disciplinary proceedings to raise a constitu-

tional challenge to the disciplinary rules. Furthermore, it is unclear whether proceedings before the Ethics Committee are more accurately viewed as prosecutorial rather than judicial in nature.

I agree with the Court that we may consider events subsequent to the decisions of the courts below because the federal litigation has addressed only the question whether abstention is appropriate. Thus far, there have been no proceedings on the merits in federal court. *Ante*, at 436–437. After the Court of Appeals rendered its decision and denied petitioner's petition for rehearing, the New Jersey Supreme Court certified the complaint against respondent Hinds to itself. App. to Pet. for Cert. 62a. Now, there are ongoing judicial proceedings in the New Jersey Supreme Court in which Hinds has been given the opportunity to raise his constitutional challenges. As a result, *Younger* abstention, at least with respect to Hinds, is appropriate at this time. For this reason only, I join the judgment of the Court.

CONNECTICUT ET AL. *v.* TEAL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80–2147. Argued March 29, 1982—Decided June 21, 1982

Respondent black employees of a Connecticut state agency were promoted provisionally to supervisors. To attain permanent status as supervisors, they had to participate in a selection process that required, as a first step, a passing score on a written examination. Subsequently, an examination was given to 48 black and 259 white candidates. Fifty-four percent of the black candidates passed, this being approximately 68 percent of the passing rate for the white candidates. Respondent black employees failed the examination and were thus excluded from further consideration for permanent supervisory positions. They then brought an action in Federal District Court against petitioners (the State of Connecticut and certain state agencies and officials), alleging that petitioners had violated Title VII of the Civil Rights Act of 1964 by requiring, as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately excluded blacks and was not job related. In the meantime, before trial, petitioners made promotions from the eligibility list, the overall result being that 22.9 percent of the black candidates were promoted but only 13.5 percent of the white candidates. Petitioners urged that this "bottom-line" result, more favorable to blacks than to whites, was a complete defense to the suit. The District Court agreed and entered judgment for petitioners, holding that the "bottom line" percentages precluded the finding of a Title VII violation and that petitioners were not required to demonstrate that the promotional examination was job related. The Court of Appeals reversed, holding that the District Court erred in ruling that the examination results alone were insufficient to support a prima facie case of disparate impact in violation of Title VII.

Held: Petitioners' nondiscriminatory "bottom line" does not preclude respondents from establishing a prima facie case nor does it provide petitioners with a defense to such a case. Pp. 445–456.

(a) Despite petitioners' nondiscriminatory "bottom line," respondents' claim of disparate impact from the examination, a pass-fail barrier to employment opportunity, states a prima facie case of employment discrimination under § 703(a)(2) of Title VII, which makes it an unlawful employment practice for an employer to "limit, segregate, or classify his employees" in any way which would deprive "any individual of employ-

ment opportunities" because of race, color, religion, sex, or national origin. To measure disparate impact only at the "bottom line" ignores the fact that Title VII guarantees these individual black respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria. Respondents' rights under § 703(a)(2) have been violated unless petitioners can demonstrate that the examination in question was not an artificial, arbitrary, or unnecessary barrier but measured skills related to effective performance as a supervisor. Pp. 445–451.

(b) No special haven for discriminatory tests is offered by § 703(h) of Title VII, which provides that it shall not be an unlawful employment practice for an employer to act upon results of an ability test if such test is "not designed, intended, or used to discriminate" because of race, color, religion, sex, or national origin. A non-job-related test that has a disparate impact and is used to "limit" or "classify" employees is "used to discriminate" within the meaning of Title VII, whether or not it was "designed or intended" to have this effect and despite an employer's efforts to compensate for its discriminatory effect. Pp. 451–452.

(c) The principal focus of § 703(a)(2) is the protection of the individual employee, rather than the protection of the minority group as a whole. To suggest that the "bottom line" may be a defense to a claim of discrimination against an individual employee confuses unlawful discrimination with discriminatory intent. Resolution of the factual question of intent is not what is at issue in this case, but rather petitioners seek to justify discrimination against the black respondents on the basis of petitioners' favorable treatment of other members of these respondents' racial group. Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. Pp. 452–456.

645 F. 2d 133, affirmed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 456.

Bernard F. McGovern, Jr., Assistant Attorney General of Connecticut, argued the cause for petitioners. With him on the briefs were *Carl R. Ajello*, Attorney General, *Peter W. Gillies*, Deputy Attorney General, and *Robert E. Walsh*, *Sidney D. Giber*, and *Thomas P. Clifford III*, Assistant Attorneys General.

Thomas W. Bucci argued the cause for respondents. With him on the brief was *Sidney L. Dworkin.**

JUSTICE BRENNAN delivered the opinion of the Court.

We consider here whether an employer sued for violation of Title VII of the Civil Rights Act of 1964[1] may assert a "bottom-line" theory of defense. Under that theory, as asserted in this case, an employer's acts of racial discrimination in promotions—effected by an examination having disparate impact—would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the "bottom-line" result of the promotional process was an appropriate racial balance. We hold that the "bottom line" does not preclude respondent employees from establishing a prima facie case, nor does it provide petitioner employer with a defense to such a case.

I

Four of the respondents, Winnie Teal, Rose Walker, Edith Latney, and Grace Clark, are black employees of the Department of Income Maintenance of the State of Connecticut.[2]

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Harriet S. Shapiro, Brian K. Landsberg, David L. Rose,* and *Joan A. Magagna* for the United States; by *Robert E. Williams* and *Douglas S. McDowell* for the Equal Employment Advisory Council et al.; and by *Leonard S. Janofsky* and *Paul Grossman* for the National League of Cities et al.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll, Robert M. Weinberg, Michael H. Gottesman,* and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; and by *Richard C. Dinkelspiel, William L. Robinson, Norman J. Chachkin,* and *Beatrice Rosenberg* for the Lawyers' Committee for Civil Rights Under Law.

[1] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV).

[2] The black respondents were joined as plaintiffs by four white employees on a pendent claim that the written test violated provisions of state law that require promotional exams to be job related. That claim is not before us. See 645 F. 2d 133, 135, n. 3 (CA2 1981).

Each was promoted provisionally to the position of Welfare Eligibility Supervisor and served in that capacity for almost two years. To attain permanent status as supervisors, however, respondents had to participate in a selection process that required, as the first step, a passing score on a written examination. This written test was administered on December 2, 1978, to 329 candidates. Of these candidates, 48 identified themselves as black and 259 identified themselves as white. The results of the examination were announced in March 1979. With the passing score set at 65,[3] 54.17 percent of the identified black candidates passed. This was approximately 68 percent of the passing rate for the identified white candidates.[4] The four respondents were among the blacks who failed the examination, and they were thus excluded

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[3] The mean score on the examination was 70.4 percent. However, because the black candidates had a mean score 6.7 percentage points lower than the white candidates, the passing score was set at 65, apparently in an attempt to lessen the disparate impact of the examination. See *id.*, at 135, and n. 4.

[4] The following table shows the passing rates of various candidate groups:

Candidate Group	Number	No. Receiving Passing Score	Passing Rate (%)
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.54
Unidentified	15	9	60.00
Total	329	246	74.77

Petitioners do not contest the District Court's implicit finding that the examination itself resulted in disparate impact under the "eighty percent rule" of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission. See App. to Pet. for Cert. 18a, 23a, and n. 2. Those guidelines provide that a selection rate that "is less than [80 percent] of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 CFR § 1607.4D (1981).

from further consideration for permanent supervisory positions. In April 1979, respondents instituted this action in the United States District Court for the District of Connecticut against petitioners, the State of Connecticut, two state agencies, and two state officials. Respondents alleged, *inter alia*, that petitioners violated Title VII by imposing, as an absolute condition for consideration for promotion, that applicants pass a written test that excluded blacks in disproportionate numbers and that was not job related.

More than a year after this action was instituted, and approximately one month before trial, petitioners made promotions from the eligibility list generated by the written examination. In choosing persons from that list, petitioners considered past work performance, recommendations of the candidates' supervisors and, to a lesser extent, seniority. Petitioners then applied what the Court of Appeals characterized as an affirmative-action program in order to ensure a significant number of minority supervisors.[5] Forty-six persons were promoted to permanent supervisory positions, 11 of whom were black and 35 of whom were white. The overall result of the selection process was that, of the 48 identified black candidates who participated in the selection process, 22.9 percent were promoted and of the 259 identified white candidates, 13.5 percent were promoted.[6] It is this "bottom-line" result, more favorable to blacks than to whites, that petitioners urge should be adjudged to be a complete defense to respondents' suit.

After trial, the District Court entered judgment for petitioners. App. to Pet. for Cert. 18a. The court treated respondents' claim as one of disparate impact under *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), *Albemarle Paper Co.*

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[5] Petitioners contest this characterization of their selection procedure. We have no need, however, to resolve this dispute in the context of the present controversy.

[6] The actual promotion rate of blacks was thus close to 170 percent that of the actual promotion rate of whites.

v. *Moody*, 422 U. S. 405 (1975), and *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977). However, the court found that, although the comparative passing rates for the examination indicated a prima facie case of adverse impact upon minorities, the result of the entire hiring process reflected no such adverse impact. Holding that these "bottom-line" percentages precluded the finding of a Title VII violation, the court held that the employer was not required to demonstrate that the promotional examination was job related. App. to Pet. for Cert. 22a–24a, 26a. The United States Court of Appeals for the Second Circuit reversed, holding that the District Court erred in ruling that the results of the written examination alone were insufficient to support a prima facie case of disparate impact in violation of Title VII. 645 F. 2d 133 (1981). The Court of Appeals stated that where "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process," that barrier must be shown to be job related. *Id.*, at 138. We granted certiorari, 454 U. S. 813 (1981), and now affirm.

II

A

We must first decide whether an examination that bars a disparate number of black employees from consideration for promotion, and that has not been shown to be job related, presents a claim cognizable under Title VII. Section 703 (a)(2) of Title VII provides in pertinent part:

> "It shall be an unlawful employment practice for an employer—
>
> . . . . . .
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as

an employee, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, as amended, 42 U. S. C. § 2000e–2(a)(2).

Respondents base their claim on our construction of this provision in *Griggs* v. *Duke Power Co.*, *supra*. Prior to the enactment of Title VII, the Duke Power Co. restricted its black employees to the labor department. Beginning in 1965, the company required all employees who desired a transfer out of the labor department to have either a high school diploma or to achieve a passing grade on two professionally prepared aptitude tests. New employees seeking positions in any department other than labor had to possess both a high school diploma and a passing grade on these two examinations. Although these requirements applied equally to white and black employees and applicants, they barred employment opportunities to a disproportionate number of blacks. While there was no showing that the employer had a racial purpose or invidious intent in adopting these requirements, this Court held that they were invalid because they had a disparate impact and were not shown to be related to job performance:

> "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U. S., at 431.

Griggs and its progeny have established a three-part analysis of disparate-impact claims. To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to

avoid a finding of discrimination. *Griggs*, *supra*, at 432. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination. See *Albemarle Paper Co.*, *supra*, at 425; *Dothard*, *supra*, at 329.[7]

Griggs recognized that in enacting Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment" and professional development that had historically been encountered by women and blacks as well as other minorities. 401 U. S., at 431. See also *Dothard* v. *Rawlinson*, *supra*.[8] *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), explained that

> "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *Id.*, at 806.

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[7] Petitioners apparently argue both that the nondiscriminatory "bottom line" precluded respondents from establishing a prima facie case and, in the alternative, that it provided a defense.

[8] The legislative history of the 1972 amendments to Title VII, 86 Stat. 103–113, is relevant to this case because those amendments extended the protection of the Act to respondents here by deleting exemptions for state and municipal employers. See 86 Stat. 103. That history demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*. Both the House and Senate Reports cited *Griggs* with approval, the Senate Report noting:

"Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs." S. Rep. No. 92–415, p. 5 (1971).

See also H. R. Rep. No. 92–238, p. 8 (1971). In addition, the section-by-section analyses of the 1972 amendments submitted to both Houses explicitly stated that in any area not addressed by the amendments, present case law—which as Congress had already recognized included our then recent decision in *Griggs*—was intended to continue to govern. 118 Cong. Rec. 7166, 7564 (1972).

Petitioners' examination, which barred promotion and had a discriminatory impact on black employees, clearly falls within the literal language of § 703(a)(2), as interpreted by *Griggs*. The statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*.[9] A disparate-impact claim reflects the language of § 703(a)(2) and Congress' basic objectives in enacting that statute: "to achieve equality of employment *opportunities* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U. S., at 429–430 (emphasis added). When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment *opportunity* "because of . . . race, color, religion, sex, or national origin." In other words, § 703(a)(2) prohibits discriminatory "artificial, arbitrary, and unnecessary barriers to employment," 401 U. S., at 431, that "limit . . . or classify . . . applicants for employment . . . in any way which would deprive or tend to deprive any individual of employment *opportunities*." (Emphasis added.)

Relying on § 703(a)(2), *Griggs* explicitly focused on employment "practices, procedures, or tests," 401 U. S., at 430, that deny equal employment "opportunity," *id.*, at 431. We concluded that Title VII prohibits "procedures or testing mechanisms that operate as 'built-in headwinds' for minority

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[9] In contrast, the language of § 703(a)(1), 42 U. S. C. § 2000e–2(a)(1), if it were the only protection given to employees and applicants under Title VII, might support petitioners' exclusive focus on the overall result. That subsection makes it an unlawful employment practice

"to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

groups." *Id.*, at 432. We found that Congress' primary purpose was the prophylactic one of achieving equality of employment "opportunities" and removing "barriers" to such equality. *Id.*, at 429–430. See *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 417. The examination given to respondents in this case surely constituted such a practice and created such a barrier.

Our conclusion that § 703(a)(2) encompasses respondents' claim is reinforced by the terms of Congress' 1972 extension of the protections of Title VII to state and municipal employees. See n. 8, *supra*. Although Congress did not explicitly consider the viability of the defense offered by the state employer in this case, the 1972 amendments to Title VII do reflect Congress' intent to provide state and municipal employees with the protection that Title VII, as interpreted by *Griggs*, had provided to employees in the private sector: equality of *opportunity* and the elimination of discriminatory *barriers* to professional development. The Committee Reports and the floor debates stressed the need for equality of opportunity for minority applicants seeking to obtain governmental positions. *E. g.*, S. Rep. No. 92–415, p. 10 (1971); 118 Cong. Rec. 1815 (1972) (remarks of Sen. Williams). Congress voiced its concern about the widespread use by state and local governmental agencies of "invalid selection techniques" that had a discriminatory impact. S. Rep. No. 92–415, *supra*, at 10; H. R. Rep. No. 92–238, p. 17 (1971); 117 Cong. Rec. 31961 (1971) (remarks of Rep. Perkins).[10]

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[10] The Committee Reports in both Houses, and Senator Williams, principal sponsor of the Senate bill that was ultimately enacted in large part, relied upon a report of the United States Commission on Civil Rights, which Senator Williams placed in the Congressional Record. See H. R. Rep. No. 92–238, p. 17 (1971); S. Rep. No. 92–415, p. 10 (1971); 118 Cong. Rec. 1815–1819 (1972). The Commission concluded that serious "[b]arriers to equal opportunity" existed for state and local government employees. Two of the three barriers cited were "recruitment and selection devices which are arbitrary, unrelated to job performance, and result in unequal

The decisions of this Court following *Griggs* also support respondents' claim. In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted. Thus *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977), found that minimum statutory height and weight requirements for correctional counselors were the sort of arbitrary barrier to equal employment opportunity for women forbidden by Title VII. Although we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this "bottom line." We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment. *Id.*, at 329–330, and n. 12. Similarly, in *Albemarle Paper Co.* v. *Moody*, *supra*, the action was remanded to allow the employer to attempt to show that the tests that he had given to his employees for promotion were job related. We did not suggest that by promoting a sufficient number of the black employees who passed the examination, the employer could avoid this burden. See 422 U. S., at 436. See also *New York Transit Authority* v. *Beazer*, 440 U. S. 568, 584 (1979) ("A prima facie violation of the Act may be established by statistical evidence showing that an employment *practice* has the effect of denying members of one race equal access to employment *opportunities*") (emphasis added).

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treatment of minorities," and promotions made on the basis of "criteria unrelated to job performance and on discriminatory supervisory ratings." U. S. Commission on Civil Rights, For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment 119 (1969), reprinted in 118 Cong. Rec. 1817 (1972).

In short, the District Court's dismissal of respondents' claim cannot be supported on the basis that respondents failed to establish a prima facie case of employment discrimination under the terms of § 703(a)(2). The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria. Title VII strives to achieve equality of opportunity by rooting out "artificial, arbitrary, and unnecessary" employer-created barriers to professional development that have a discriminatory impact upon individuals. Therefore, respondents' rights under § 703(a)(2) have been violated, unless petitioners can demonstrate that the examination given was not an artificial, arbitrary, or unnecessary barrier, because it measured skills related to effective performance in the role of Welfare Eligibility Supervisor.

B

The United States, in its brief as *amicus curiae*, apparently recognizes that respondents' claim in this case falls within the affirmative commands of Title VII. But it seeks to support the District Court's judgment in this case by relying on the defenses provided to the employer in § 703(h).[11] Section 703(h) provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate be-

[11] The Government's brief is submitted by the Department of Justice, which shares responsibility for federal enforcement of Title VII with the Equal Employment Opportunity Commission (EEOC). The EEOC declined to join this brief. See Brief for United States as *Amicus Curiae* 1, and n.

cause of race, color, religion, sex or national origin." 78 Stat. 257, as amended, 42 U. S. C. § 2000e–2(h).

The Government argues that the test administered by the petitioners was not "used to discriminate" because it did not actually deprive disproportionate numbers of blacks of promotions. But the Government's reliance on § 703(h) as offering the employer some special haven for discriminatory tests is misplaced. We considered the relevance of this provision in *Griggs*. After examining the legislative history of § 703(h), we concluded that Congress, in adding § 703(h), intended only to make clear that tests that were *job related* would be permissible despite their disparate impact. 401 U. S., at 433–436. As the Court recently confirmed, § 703 (h), which was introduced as an amendment to Title VII on the Senate floor, "did not alter the meaning of Title VII, but 'merely clarifie[d] its present intent and effect.'" *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 73, n. 11 (1982), quoting 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey). A non-job-related test that has a disparate racial impact, and is used to "limit" or "classify" employees, is "used to discriminate" within the meaning of Title VII, whether or not it was "designed or intended" to have this effect and despite an employer's efforts to compensate for its discriminatory effect. See *Griggs*, 401 U. S., at 433.

In sum, respondents' claim of disparate impact from the examination, a pass-fail barrier to employment opportunity, states a prima facie case of employment discrimination under § 703(a)(2), despite their employer's nondiscriminatory "bottom line," and that "bottom line" is no defense to this prima facie case under § 703(h).

III

Having determined that respondents' claim comes within the terms of Title VII, we must address the suggestion of petitioners and some *amici curiae* that we recognize an exception, either in the nature of an additional burden on plaintiffs

seeking to establish a prima facie case or in the nature of an affirmative defense, for cases in which an employer has compensated for a discriminatory pass-fail barrier by hiring or promoting a sufficient number of black employees to reach a nondiscriminatory "bottom line." We reject this suggestion, which is in essence nothing more than a request that we redefine the protections guaranteed by Title VII.[12]

Section 703(a)(2) prohibits practices that would deprive or tend to deprive "*any individual* of employment opportunities." The principal focus of the statute is the protection of the individual employee, rather than the protection of the mi-

[12] Petitioners suggest that we should defer to the EEOC Guidelines in this regard. But there is nothing in the Guidelines to which we might defer that would aid petitioners in this case. The most support petitioners could conceivably muster from the Uniform Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1981) (now issued jointly by the EEOC, the Office of Personnel Management, the Department of Labor, and the Department of Justice, see 29 CFR § 1607.1A (1981)), is *neutrality* on the question whether a discriminatory barrier that does not result in a discriminatory overall result constitutes a violation of Title VII. Section 1607.4C of the Guidelines, relied upon by petitioners, states that as a matter of "*administrative and prosecutorial discretion, in usual circumstances*," the agencies will not take enforcement action based upon the disparate impact of any component of a selection process if the total selection process results in no adverse impact. (Emphasis added.) The agencies made clear that the "guidelines do not address the underlying question of law," and that an individual "who is denied the job because of a particular component in a procedure which otherwise meets the 'bottom line' standard . . . retains the right to proceed through the appropriate agencies, and into Federal court." 43 Fed. Reg. 38291 (1978). See 29 CFR § 1607.16I (1981). In addition, in a publication entitled Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, the agencies stated:

"Since the [bottom-line] concept is not a rule of law, it does not affect the discharge by the EEOC of its statutory responsibilities to investigate charges of discrimination, render an administrative finding on its investigation, and engage in voluntary conciliation efforts. Similarly, with respect to the other issuing agencies, the bottom line concept applies not to the processing of individual charges, but to the initiation of enforcement action." 44 Fed. Reg. 12000 (1979).

nority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e. g.*, §§ 703(a)(1), (b), (c), 704(a), 78 Stat. 255–257, as amended, 42 U. S. C. §§ 2000e–2(a)(1), (b), (c), 2000e–3(a); 110 Cong. Rec. 7213 (1964) (interpretive memorandum of Sens. Clark and Case) ("discrimination is prohibited as to any individual"); *id.*, at 8921 (remarks of Sen. Williams) ("Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job").

In suggesting that the "bottom line" may be a defense to a claim of discrimination against an individual employee, petitioners and *amici* appear to confuse unlawful discrimination with discriminatory intent. The Court has stated that a nondiscriminatory "bottom line" and an employer's good-faith efforts to achieve a nondiscriminatory work force, might in some cases assist an employer in rebutting the inference that particular action had been intentionally discriminatory: "Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided." *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 580 (1978). See also *Teamsters* v. *United States*, 431 U. S. 324, 340, n. 20 (1977). But resolution of the factual question of intent is not what is at issue in this case. Rather, petitioners seek simply to justify discrimination against respondents on the basis of their favorable treatment of other members of respondents' racial group. Under Title VII, "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Furnco Construction Corp.* v. *Waters*, 438 U. S., at 579.

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether

members of the applicant's race are already proportionately represented in the work force. See *Griggs* v. *Duke Power Co.*, 401 U. S., at 430; *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 279 (1976)." *Ibid.* (emphasis in original).

It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. We recognized in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individual is unambiguous." *Id.*, at 708. Similarly, in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) *(per curiam)*, we recognized that a rule barring employment of all married *women* with preschool children, if not a bona fide occupational qualification under §703(e), violated Title VII, even though female applicants without preschool children were hired in sufficient numbers that they constituted 75 to 80 percent of the persons employed in the position plaintiff sought.

Petitioners point out that *Furnco*, *Manhart*, and *Phillips* involved facially discriminatory policies, while the claim in the instant case is one of discrimination from a facially neutral policy. The fact remains, however, that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be "of little comfort to the victims of . . . discrimination." *Teamsters* v. *United States*, *supra*, at 342. Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory. Every *individual* employee is protected against both discriminatory treatment

and "practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U. S., at 431. Requirements and tests that have a discriminatory impact are merely some of the more subtle, but also the more pervasive, of the "practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U. S., at 800.

IV

In sum, petitioners' nondiscriminatory "bottom line" is no answer, under the terms of Title VII, to respondents' prima facie claim of employment discrimination. Accordingly, the judgment of the Court of Appeals for the Second Circuit is affirmed, and this case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

In past decisions, this Court has been sensitive to the critical difference between cases proving discrimination under Title VII, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), by a showing of disparate treatment or discriminatory intent and those proving such discrimination by a showing of disparate impact. Because today's decision blurs that distinction and results in a holding inconsistent with the very nature of disparate-impact claims, I dissent.

I

Section 703(a)(2) of Title VII, 42 U. S. C. § 2000e–2(a)(2), provides that it is an unlawful employment practice for an employer to

> "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

> otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Although this language suggests that discrimination occurs only on an individual basis, in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971), the Court held that discriminatory intent on the part of the employer against an individual need not be shown when "employment procedures or testing mechanisms . . . operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Thus, the Court held that the "disparate impact" of an employer's practices on a racial group can violate § 703(a)(2) of Title VII. In *Griggs* and each subsequent disparate-impact case, however, the Court has considered, not whether the claimant as an individual had been classified in a manner impermissible under § 703(a)(2), but whether an employer's procedures have had an adverse impact on the protected *group* to which the individual belongs.

Thus, while disparate-*treatment* cases focus on the way in which an individual has been treated, disparate-*impact* cases are concerned with the protected group. This key distinction was explained in *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 581–582 (1978) (MARSHALL, J., concurring in part):

> "It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977). An individual may allege that he has been subjected to 'disparate treatment' because of his race, or that he has been the victim of a facially neutral practice having a 'disparate impact' on his racial group."[1]

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[1] See also *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977) (similar explanation).

In keeping with this distinction, our disparate-impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group.[2] If this case were decided by reference to the total process—as our cases suggest that it should be—the result would be clear. Here 22.9% of the blacks who entered the selection process were ultimately promoted, compared with only 13.5% of the whites. To say that this selection process had an unfavorable "disparate impact" on blacks is to ignore reality.

The Court, disregarding the distinction drawn by our cases, repeatedly asserts that Title VII was designed to protect individual, not group, rights. It emphasizes that some individual blacks were eliminated by the disparate impact of the preliminary test. But this argument confuses the *aim* of Title VII with the legal theories through which its aims were intended to be vindicated. It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct methods of proof. In one set of cases—those involving direct proof of discriminatory intent—the plaintiff seeks to establish direct, intentional discrimination against him. In that type of case, the individual is at the forefront throughout the entire presentation of evidence. In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group

[2] See *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977) (statutory height and weight requirements operated as a bar to *employment* of disproportionate number of women); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 409–411 (1975) (seniority system allegedly locked blacks into lower paying jobs; applicants to skilled lines of progression were required to pass two tests); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971) (tests were an absolute bar to transfers or hiring; the Court observed that all Congress requires is "the removal of artificial, arbitrary, and unnecessary barriers to *employment* . . .") (emphasis added).

to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process' "'built-in headwinds.'" *Griggs*, *supra*, at 432. But this method of proof—which actually *defines* disparate-impact theory under Title VII—invites the plaintiff to prove discrimination by reference to the group rather than to the allegedly affected individual.[3] There can be no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a *group*.[4]

In this case respondent black employees seek to benefit from a conflation of "discriminatory treatment" and "disparate impact" theories. But they cannot have it both ways. Having undertaken to prove discrimination by reference to one set of group figures (used at a preliminary point in the selection process), these respondents then claim that *non*discrimination cannot be proved by viewing the impact of the entire process on the group as a whole. The fallacy of this reasoning—accepted by the Court—is transparent. It is to

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[3] Initially, the plaintiff bears the burden of establishing a prima facie case that Title VII has been infringed. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 252–253 (1981). In a disparate-impact case, this burden is met by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group. See *Teamsters* v. *United States*, *supra*, at 336–338. Regardless of whether the plaintiff's prima facie case must itself focus on the defendant's overall selection process or whether it is sufficient that the plaintiff establish that at least one pass-fail barrier has resulted in disparate impact, the employer's presentation of evidence showing that its overall selection procedure does not operate in a discriminatory fashion certainly dispels any inference of discrimination. In such instances, at the close of the evidence, the plaintiff has failed to show disparate impact by a preponderance of the evidence.

[4] The Equal Employment Opportunity Commission and other federal enforcement agencies have adopted the "bottom-line" principle—*i. e.*, the process viewed as a whole—in deciding when to bring an action against an employer. See Uniform Guidelines on Employee Selection Procedures, 5 CFR § 300.103(c) (1981).

confuse the individualistic *aim* of Title VII with the methods of proof by which Title VII rights may be vindicated. The respondents, as individuals, are entitled to the full personal protection of Title VII. But, having undertaken to prove a violation of their rights by reference to group figures, respondents cannot deny petitioners the opportunity to rebut their evidence by introducing figures of the same kind. Having pleaded a disparate-impact case, the plaintiff cannot deny the defendant the opportunity to show that there was no disparate impact. As the Court of Appeals for the Third Circuit noted in *EEOC* v. *Greyhound Lines, Inc.*, 635 F. 2d 188, 192 (1980):

> "[N]o violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer's workforce. This conclusion should be as obvious as it is tautological: there can be no disparate impact unless there is [an ultimate] disparate impact."

Where, under a facially neutral employment process, there has been no adverse effect on the group—and certainly there has been none here—Title VII has not been infringed.

II

The Court's position is no stronger in case authority than it is in logic. None of the cases relied upon by the Court controls the outcome of this case.[5] Indeed, the disparate-

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[5]The Court concentrates on cases of questionable relevance. Most of the lower courts that have squarely considered the question have concluded that there can be no violation of Title VII on a disparate-impact basis when there is no disparate impact at the *bottom line*. See, *e. g.*, *EEOC* v. *Greyhound Lines, Inc.*, 635 F. 2d 188 (CA3 1980); *EEOC* v. *Navajo Refining Co.*, 593 F. 2d 988 (CA10 1979); *Friend* v. *Leidinger*, 588 F. 2d 61, 66 (CA4 1978); *Rule* v. *International Assn. of Ironworkers*, 568 F. 2d 558 (CA8 1977); *Smith* v. *Troyan*, 520 F. 2d 492, 497–498 (CA6 1975), cert. denied, 426 U. S. 934 (1976); *Williams* v. *City & County of San Francisco*, 483 F. Supp. 335 (ND Cal. 1979); *Brown* v. *New Haven Civil Service*

impact cases do not even support the propositions for which they are cited. For example, the Court cites *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977) (holding impermissible minimum statutory height and weight requirements for correctional counselors), and observes that "[a]lthough we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this 'bottom line.' We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment." *Ante*, at 450. In *Dothard*, however, the Court was not considering a case in which there was any difference between the discriminatory effect of the employment standard and the number of minority members actually hired. The *Dothard* Court itself stated:

> "[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question *select* applicants *for hire* in a discriminatory pattern. Once it is shown that *the employment standards* are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'" 433 U. S., at 329 (emphasis added).

The *Dothard* Court did not decide today's case. It addressed only a case in which the challenged standards had a discriminatory impact at the bottom line—the hiring decision. And the *Dothard* Court's "focus," referred to by the Court, is of no help in deciding the instant case.[6]

Board, 474 F. Supp. 1256 (Conn. 1979); *Lee* v. *City of Richmond*, 456 F. Supp. 756 (ED Va. 1978).

[6] The Court cites language from two other disparate-impact cases. The Court notes that in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), the Court "remanded to allow the employer to attempt to show that the tests . . . given . . . for promotion were job related." *Ante*, at 450. But the fact that the Court did so without suggesting "that by promoting a suf-

The Court concedes that the other major cases on which it relies, *Furnco, Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), and *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) *(per curiam)* "involved facially discriminatory policies, while the claim in the instant case is one of discrimination from a facially neutral policy." *Ante*, at 455. The Court nevertheless applies the principles derived from those cases to the case at bar. It does so by reiterating the view that Title VII protects *individuals*, not *groups*, and therefore that the manner in which an employer has treated other members of a group cannot defeat the claim of an individual who has suffered as a result of even a facially neutral policy. As appealing as this sounds, it confuses the distinction—uniformly recognized until today—between disparate *impact* and disparate *treatment*. See *supra*, at 457–458. Our cases, cited above, have made clear that discriminatory-impact claims cannot be based on how an individual is treated in isolation from the treatment of other members of the group. Such claims necessarily are based on whether the group fares less well than other groups under a policy, practice, or test. Indeed, if only one minority member has

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ficient number of black employees who passed the examination, the employer could avoid this burden," *ibid.*, can hardly be precedent for the negative of that proposition when the issue was neither presented in the facts of the case nor addressed by the Court.

Similarly, *New York Transit Authority* v. *Beazer*, 440 U. S. 568 (1979), provides little support despite the language quoted by the Court. See *ante*, at 450, quoting 440 U. S., at 584 ("'A prima facie violation of the Act may be established by statistical evidence showing that an employment *practice* has the effect of denying members of one race equal access to employment *opportunities*'") (emphasis added by the Court). In *Beazer*, the Court ruled that the statistical evidence actually presented was insufficient to establish a prima facie case of discrimination, and in doing so it indicated that it would have found statistical evidence of the number of applicants *and* employees in a methadone program quite probative. See *id.*, at 585. *Beazer* therefore does not justify the Court's speculation that the number of blacks and Hispanics actually employed were irrelevant to whether a case of disparate impact had been established under Title VII.

taken a test, a disparate-impact claim cannot be made, regardless of whether the test is an initial step in the selection process or one of several factors considered by the employer in making an employment decision.[7]

III

Today's decision takes a long and unhappy step in the direction of confusion. Title VII does not require that employers adopt merit hiring or the procedures most likely to permit the greatest number of minority members to be considered for or to qualify for jobs and promotions. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 258–259 (1981); *Furnco*, 438 U. S., at 578. Employers need not develop tests that accurately reflect the skills of every individual candidate; there are few if any tests that do so. Yet the Court seems unaware of this practical reality, and perhaps oblivious to the likely consequences of its decision. By its holding today, the Court may force employers either to eliminate tests or rely on expensive, job-related, testing procedures, the validity of which may or may not be sustained if challenged. For state and local governmental employers with limited funds, the practical effect of today's decision may well be the adoption of simple quota hiring.[8] This arbi-

[7] Courts have recognized that the probative value of statistical evidence varies with sample size in disparate-impact cases. See, *e. g.*, *Teamsters* v. *United States*, 431 U. S., at 340, n. 20 ("Considerations such as small sample size may, of course, detract from the value of such evidence . . ."); *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 621 (1974) ("[T]he District Court's concern for the smallness of the sample presented by the 13-member Panel was . . . well founded"); *Rogillio* v. *Diamond Shamrock Chemical Co.*, 446 F. Supp. 423, 427–428 (SD Tex. 1978) (sample of 10 too small); *Dendy* v. *Washington Hospital Center*, 431 F. Supp. 873, 876 (DC 1977) (sample must be "large enough to mirror the reality of the employment situation"). A sample of only one would have far too little probative value to establish a prima facie case of disparate impact.

[8] Another possibility is that employers may integrate consideration of test results into one overall hiring decision based on that "factor" *and* addi-

trary method of employment is itself unfair to individual applicants, whether or not they are members of minority groups. And it is not likely to produce a competent work force. Moreover, the Court's decision actually may result in employers employing *fewer* minority members. As Judge Newman noted in *Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256, 1263 (Conn. 1979):

> "[A]s private parties are permitted under Title VII itself to adopt voluntary affirmative action plans, . . . Title VII should not be construed to prohibit a municipality's using a hiring process that results in a percentage of minority policemen approximating their percentage of the local population, instead of relying on the expectation that a validated job-related testing procedure will produce an equivalent result, yet with the risk that it might lead to substantially less minority hiring."

Finding today's decision unfortunate in both its analytical approach and its likely consequences, I dissent.

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tional factors. Such a process would not, even under the Court's reasoning, result in a finding of discrimination on the basis of disparate impact unless the actual hiring decisions had a disparate impact on the minority group. But if employers integrate test results into a single-step decision, they will be free to select *only* the number of minority candidates proportional to their representation in the work force. If petitioners had used this approach, they would have been able to hire substantially fewer blacks without liability on the basis of disparate impact. The Court hardly could have intended to encourage this.

Syllabus

BLUE SHIELD OF VIRGINIA ET AL. *v.* McCREADY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-225. Argued March 24, 1982—Decided June 21, 1982

Respondent employee was provided coverage under a prepaid group health plan purchased by her employer from petitioner Blue Shield of Virginia (Blue Shield). The plan provided reimbursement for part of the cost incurred by subscribers for outpatient treatment for mental and nervous disorders, including psychotherapy. However, Blue Shield's practice was to reimburse subscribers for services provided by *psychiatrists* but not by *psychologists* unless the treatment was supervised by and billed through a physician. Respondent was treated by a clinical psychologist and submitted claims to Blue Shield for the costs of the treatment. After the claims were routinely denied because they had not been billed through a physician, respondent brought a class action in Federal District Court, alleging that Blue Shield and petitioner Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of § 1 of the Sherman Act to exclude psychologists from receiving compensation under Blue Shield's plans. She further alleged that Blue Shield's failure to reimburse was in furtherance of the conspiracy and had caused injury to her business or property for which she was entitled to treble damages under § 4 of the Clayton Act, which provides for recovery of such damages by "[a]ny person" injured "by reason of anything" prohibited in the antitrust laws. The District Court granted petitioners' motion to dismiss, holding that respondent had no standing under § 4 to maintain her suit. The Court of Appeals reversed.

Held: Respondent has standing to maintain the action under § 4 of the Clayton Act. Pp. 472–485.

(a) The lack of restrictive language in § 4 reflects Congress' expansive remedial purpose of creating a private enforcement mechanism to deter violators and deprive them of the fruits of their illegal actions, and to provide ample compensation to victims of antitrust violations. In the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, § 4 is to be applied in accordance with its plain language and its broad remedial and deterrent objectives. Pp. 472–473.

(b) Permitting respondent to proceed does not offer the slightest possibility of a duplicative exaction from petitioners, *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, and *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720,

distinguished, since she had paid her psychologist, who thus was not injured by Blue Shield's refusal to reimburse respondent. And whatever the adverse effect of Blue Shield's actions on respondent's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits. Pp. 473–475.

(c) In determining whether a particular injury is too remote from the alleged violation to warrant § 4 standing, consideration is to be given (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4. Pp. 476–478.

(d) Respondent's injury is not rendered "remote" merely because the alleged goal of petitioners was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves. Here, the § 4 remedy cannot reasonably be restricted to those competitors whom petitioners hoped to eliminate from the market. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its alleged illegal ends, and respondent's injury was precisely the type of loss that the claimed violations would be likely to cause. Nor is the § 4 remedy unavailable to respondent on the asserted ground that standing should be limited to participants in the restrained market in group health care plans—that is, to entities, such as respondent's employer, who were purchasers of group health plans. Respondent did not allege a restraint in the market for group health plans, but instead premised her claim on the concerted refusal to reimburse under a plan that would permit reimbursement for psychologists' services. As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, she was within that area of the economy endangered by the breakdown of competitive conditions resulting from Blue Shield's selective refusal to reimburse. Pp. 478–481.

(e) Section 4 standing is not precluded on the asserted ground that respondent's injury does not reflect the "anticompetitive" effect of the alleged boycott. Her injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws. Respondent did not yield to Blue Shield's coercive pressure to induce its subscribers into selecting psychiatrists over psychologists for the services they required, but instead bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. In light of the conspiracy here alleged, respondent's injury "flows from that which

makes defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489, and falls squarely within the area of congressional concern. Pp. 481–484.

649 F. 2d 228, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 485. STEVENS, J., filed a dissenting opinion, *post*, p. 492.

Griffin B. Bell argued the cause for petitioners. With him on the briefs were *James D. Miller*, *William B. Poff*, *Ronald M. Ayers*, *Heman A. Marshall III*, *Joel I. Klein*, and *H. Bartow Farr III*.

Warwick R. Furr II argued the cause for respondent. With him on the brief were *Timothy J. Bloomfield* and *Thomas M. Brownell*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The antitrust complaint at issue in this case alleges that a group health plan's practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market. The question presented is whether a subscriber who employed the services of a psychologist has standing to maintain an action under § 4 of the Clayton Act based upon the plan's failure to provide reimbursement for the costs of that treatment.

I

From September 1975 until January 1978, respondent Carol McCready was an employee of Prince William County,

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**Paul R. Friedman*, *Bruce J. Ennis*, and *Donald N. Bersoff* filed a brief for the American Psychological Association as *amicus curiae* urging affirmance.

Va. As part of her compensation, the county provided her with coverage under a prepaid group health plan purchased from petitioner Blue Shield of Virginia (Blue Shield).[1] The plan specifically provided reimbursement for a portion of the cost incurred by subscribers with respect to outpatient treatment for mental and nervous disorders, including psychotherapy. Pursuant to this provision, Blue Shield reimbursed subscribers for psychotherapy provided by *psychiatrists*. But Blue Shield did not provide reimbursement for the services of *psychologists* unless the treatment was supervised by and billed through a physician.[2] While a subscriber to the plan, McCready was treated by a clinical psychologist. She submitted claims to Blue Shield for the costs of that treatment, but those claims were routinely denied because they had not been billed through a physician.[3]

In 1978, McCready brought this class action in the United States District Court for the Eastern District of Virginia, on behalf of all Blue Shield subscribers who had incurred costs

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[1] With petitioner Blue Shield of Southwestern Virginia.

[2] Petitioners contend that the contract between the county and Blue Shield must be read to bar payments for the services of nonphysicians. Respondent counters that between 1962 and 1972 Blue Shield routinely reimbursed subscribers for psychotherapy provided by psychologists, and that this practice was revised in 1972 as a result of the alleged conspiracy. In addition, respondent notes that in 1973 the Virginia Legislature passed a "freedom of choice" statute, Va. Code § 38.1–824 (1981), that required Blue Shield to pay for services rendered by licensed psychologists. See *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F. 2d 476, 478 (CA4 1980). She argues that Blue Shield's obligations must be read consistently with that statute, at least until that statute was held invalid as applied in *Blue Cross of Virginia* v. *Commonwealth*, 221 Va. 349, 269 S. E. 2d 827 (1980). This case arises on a motion to dismiss. We therefore assume, as McCready has alleged, that but for the alleged conspiracy to deny payment, she would have been reimbursed by Blue Shield for the cost of her psychologist's services.

[3] Apparently Blue Shield inadvertently paid one of McCready's claims. After the error was discovered, Blue Shield sought to obtain a refund from McCready for the amount paid. 649 F. 2d 228, 230, n. 4 (1981).

for psychological services since 1973 but who had not been reimbursed.[4] The complaint alleged that Blue Shield and petitioner Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of § 1 of the

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[4] A similar complaint was filed by the Virginia Academy of Clinical Psychologists (VACP) and its president against the same defendants. The District Court addressed the motions to dismiss filed in each of the cases in a single opinion. The court dismissed McCready's case—thus giving rise to the appellate decision at issue in this Court—but permitted the *VACP* case to proceed to trial. Following trial, the District Court entered judgment for the defendants, *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 469 F. Supp. 552 (1979), but the Court of Appeals reversed with respect to defendant Blue Shield, 624 F. 2d 476 (CA4 1980). The opinion of the Court of Appeals for the Fourth Circuit in the instant case states that the opinion in *VACP* "should be read in connection with" its own opinion. 649 F. 2d, at 230. A brief recitation of the decision in the *VACP* case is thus helpful in understanding the precise nature of McCready's claim.

In *VACP*, the Court of Appeals rejected the District Court's treatment of Blue Shield as a distinct entity for purposes of determining whether a conspiracy or agreement had been shown. 624 F. 2d, at 479. The court found that "the Blue Shield Plans are combinations of physicians, operating under the direction and control of their physician members." *Ibid.*

"Blue Shield Plans are not insurance companies, though they are, to a degree, insurers. Rather, they are generally characterized as prepaid health care plans, quantity purchasers of health care services. [I]n a real and legal sense, the Blue Shield Plans are agents of their member physicians." *Id.*, at 480 (citations and footnote omitted).

With respect to the question whether the alleged Blue Shield combination was "in restraint of trade," the Court of Appeals agreed with the District Court that the rule of reason was applicable, but held that the District Court had erred in finding no liability. The Court of Appeals observed that psychologists and psychiatrists compete in the psychotherapy market, and that the decisions of Blue Shield "necessarily dictate, to some extent," who will be chosen to provide psychotherapy. *Id.*, at 485. Finding that Blue Shield's policy of denying reimbursement for the psychotherapeutic services of psychologists unless billed through physicians, was not merely a cost-containment device or simply "good medical practice," as claimed by Blue Shield, the court held that Blue Shield had violated the Sherman Act. *Ibid.*

Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1,[5] "to exclude and boycott clinical psychologists from receiving compensation under" the Blue Shield plans. App. 55. McCready further alleged that Blue Shield's failure to reimburse had been in furtherance of the alleged conspiracy, and had caused injury to her business or property for which she was entitled to treble damages and attorney's fees under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15.[6]

The District Court granted petitioners' motion to dismiss, holding that McCready had no standing under § 4 to maintain her suit.[7] In the District Court's view, McCready's standing to maintain a § 4 action turned on whether she had suffered injury "within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws." App. 17. Noting that the goal of the alleged boycott was to exclude clinical psychologists from a segment of the psychotherapy market, the court concluded that the "sector of the economy *competitively* endangered" by the charged violation extended "no further than that area occupied by the psychologists." *Id.*, at 18 (emphasis in original). Thus, while McCready clearly had suffered an injury by

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[5] That section provides, in pertinent part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[6] That section provides, in pertinent part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[7] Petitioners have argued in this Court that under § 2 of the McCarran-Ferguson Act, 15 U. S. C. § 1012, their actions were exempt from the antitrust laws as part of the "business of insurance." In ruling on petitioners' motion to dismiss, the District Court concluded that respondent had adequately pleaded a boycott beyond the protection of the McCarran-Ferguson Act, 15 U. S. C. § 1013(b). Respondent points out that on a full factual record the issue was resolved against the petitioners in *VACP*, 624 F. 2d, at 483–484. The Court of Appeals did not address this question in the present case, however, and we do not reach it here.

being denied reimbursement, this injury was "too indirect and remote to be considered 'antitrust injury.'" *Ibid.*

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed, holding that McCready had alleged an injury within the meaning of § 4 of the Clayton Act and had standing to maintain the suit. 649 F. 2d 228 (1981). The court recognized that the goal of the alleged conspiracy was the exclusion of clinical psychologists from some segment of the psychotherapy market. But it held that the § 4 remedy was available to any person "whose property loss is directly or proximately caused by" a violation of the antitrust laws, and that McCready's loss was not "too remote or indirect to be covered by the Act." *Id.*, at 231.[8] The court thus

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[8] Addressing the "target area" limitation on antitrust standing recognized in several Courts of Appeals, see n. 14, *infra*, the court concluded that the policies underlying that limitation were not implicated by McCready's claim. 649 F. 2d, at 231–232. The dissenting judge took a contrary view of the "target area" rule. He emphasized that McCready had not described her injury "as a design or goal of any antitrust violation," but "rather as a consequence thereof." *Id.*, at 232. He viewed this as the determinative factor in the proper application of the "target area" test to the facts of this case:

"In determining who has standing to sue, the courts must look at who the illegal act was aimed to injure. A bystander, who is not the intended victim of the antitrust violation but who is injured nonetheless, cannot sue under the antitrust laws. His injury is too remote." *Id.*, at 233.

In addition, the dissent argued that McCready was not within the sector of the economy "competitively endangered" by the alleged violation, agreeing with the District Court that "she operated in a market which was unrestrained so far as she was concerned." *Id.*, at 234. Finally, the dissent reasoned:

"The price of psychologists' services to her was not increased by any act of the defendants. The fact that her Blue Shield contract . . . would not reimburse her for those services had nothing to do with the price she paid for the services, which . . . were not artificially inflated by an antitrust violation. . . .

". . . There is not even a claim that her psychologists' bills are higher than they would have been had the conspiracy not existed." *Id.*, at 235–236.

remanded the case to the District Court for further proceedings. We granted certiorari. 454 U. S. 962 (1981).

II

Section 4 of the Clayton Act, 38 Stat. 731, provides a treble-damages remedy to "*[a]ny person* who shall be injured in his business or property *by reason of anything* forbidden in the antitrust laws," 15 U. S. C. § 15 (emphasis added). As we noted in *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979), "[o]n its face, § 4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. *Pfizer Inc.* v. *India*, 434 U. S. 308, 313–314 (1978). See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486, and n. 10, (1977); *Perma Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968); *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U. S. 556, 572–573, and n. 10 (1982). As we have recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948).

Consistent with the congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy.[9]

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[9] In a related context we commented that "[i]n the face of [the congressional antitrust] policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress . . . ." *Radovich* v. *National Football League*, 352 U. S. 445, 454 (1957). See also *Radiant Burners, Inc.* v. *Peoples Gas Co.*, 364 U. S. 656, 659–660 (1961) *(per curiam)* (To state a claim under § 1 of the Sherman Act, "allega-

Two recent cases illustrate the point. *Pfizer Inc.* v. *India*, *supra*, afforded the statutory phrase "any person" its "naturally broad and inclusive meaning," *id.*, at 312, and held that it extends even to an action brought by a foreign sovereign. Similarly, *Reiter* v. *Sonotone Corp.*, *supra*, rejected the argument that the § 4 remedy is available only to redress injury to commercial interests. In that case we afforded the statutory term "property" its "naturally broad and inclusive meaning," and held that a consumer has standing to seek a § 4 remedy reflecting the increase in the purchase price of goods that was attributable to a price-fixing conspiracy. 442 U. S., at 338. In sum, in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives. But drawing on statutory policy, our cases have acknowledged two types of limitation on the availability of the § 4 remedy to particular classes of persons and for redress of particular forms of injury. We treat these limitations in turn.[10]

A

In *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251 (1972), we held that § 4 did not authorize a State to sue in its *parens patriae* capacity for damages to its "general economy." Noting

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tions adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires").

[10] Permitting McCready to maintain this lawsuit will, of course, further certain basic objectives of the private enforcement scheme embodied in § 4. Only by requiring violators to disgorge the "fruits of their illegality" can the deterrent objectives of the antitrust laws be fully served. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 494 (1968). See *Pfizer Inc.* v. *India*, 434 U. S. 308, 314 (1978); *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 746 (1977). But in addition to allowing Blue Shield to retain a palpable profit as a result of its unlawful plan, denying standing to McCready and the class she represents would also result in the denial of compensation for injuries resulting from unlawful conduct.

that a "large and ultimately indeterminable part of the injury to the 'general economy' . . . is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4," we concluded that "[e]ven the most lengthy and expensive trial could not . . . cope with the problems of double recovery inherent in allowing damages" for injury to the State's quasi-sovereign interests. *Id.*, at 264. See *Reiter* v. *Sonotone Corp.*, *supra*, at 342.

In *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), similar concerns prevailed. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), had held that an antitrust defendant could not relieve itself of its obligation to pay damages resulting from overcharges to a direct-purchaser plaintiff by showing that the plaintiff had passed the amount of the overcharge on to its own customers. *Illinois Brick* was an action by an indirect purchaser claiming damages from the antitrust violator measured by the amount that had been passed on to it. Relying in part on *Hawaii* v. *Standard Oil Co.*, *supra*, the Court found unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant. *Illinois Brick*, *supra*, at 730–731. The Court found that the splintered recoveries and litigative burdens that would result from a rule requiring that the impact of an overcharge be apportioned between direct and indirect purchasers could undermine the active enforcement of the antitrust laws by private actions. 431 U. S., 745–747. The Court concluded that direct purchasers rather than indirect purchasers were the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble-damages remedy was intended to promote. *Id.*, at 735.

The policies identified in *Hawaii* and *Illinois Brick* plainly offer no support for petitioners here. Both cases focused on the risk of duplicative recovery engendered by allowing

every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws. But permitting respondent to proceed in the circumstances of this case offers not the slightest possibility of a duplicative exaction from petitioners. McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services. And whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits.[11]

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[11] If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick*, it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. Where consistent with the broader remedial purposes of the antitrust laws, we have sought to avoid burdening § 4 actions with damages issues giving rise to the need for "massive evidence and complicated theories," where the consequence would be to discourage vigorous enforcement of the antitrust laws by private suits. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, *supra*, at 493. Thus we recognized that the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system. See *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 264 (1972); *Illinois Brick Co.* v. *Illinois*, *supra*, at 741–742. In addition, while "[d]ifficulty of ascertainment [should not be] confused with right of recovery," *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 265 (1946), § 4 plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm. See *Hawaii* v. *Standard Oil Co.*, *supra*, at 262–263, n. 14. But like the policy against duplicative recoveries, our cautious approach to speculative, abstract, or impractical damages theories has no application to McCready's suit. The nature of her injury is easily stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, as the

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Analytically distinct from the restrictions on the § 4 remedy recognized in *Hawaii* and *Illinois Brick*, there is the conceptually more difficult question "of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue for damages under § 4." *Illinois Brick Co.* v. *Illinois*, 431 U. S., at 728, n. 7 (emphasis added).[12] An antitrust violation may be expected to cause ripples of

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Court of Appeals observed, they could be "ascertained to the penny." 649 F. 2d, at 231.

[12] We addressed two issues of "remoteness" in *Perkins* v. *Standard Oil Co.*, 395 U. S. 642 (1969). That case involved an alleged violation of § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13. Focusing on the substantive terms of § 2, we found no warrant in its "language or purpose" to engraft an "artificial" limitation on the reach of the remedy to bar what the court below had termed a "fourth level" injury. 395 U. S., at 648. We also rejected the claim that one form of damages claimed by the defendant was not the proximate result of the alleged violation. *Id.*, at 649.

The Courts of Appeals have developed a more substantial jurisprudence on the subject of "remoteness," formulating various "tests" as aids in analysis. Among the tests employed by the lower courts are those that focus on the "directness" of the injury, *e. g.*, *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (CA3 1910); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F. 2d 678 (CA2 1955); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (CA6 1962); on its foreseeability, *e. g.*, *In re Western Liquid Asphalt Cases*, 487 F. 2d 191, 199 (CA9 1973); *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d 190, 220 (CA9 1964); or on whether the injury is "arguably . . . within the zone of interests protected by the [antitrust laws]," *e. g.*, *Malamud* v. *Sinclair Oil Corp.*, 521 F. 2d 1142, 1152 (CA6 1975). See also n. 14, *infra* ("target area" test). The Third Circuit has concluded that "§ 4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all § 4 standing problems." *Bravman* v. *Basset Furniture Industries, Inc.*, 552 F. 2d 90, 99 (1977). The Third Circuit has thus rejected the definitional approach, opting instead for an analysis of the "factual matrix" presented by each case. *Ibid.* We have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury.

harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." *Id.*, at 760 (BRENNAN, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. Of course, neither the statutory language nor the legislative history of § 4 offers any focused guidance on the question of which injuries are too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under § 4; indeed, the unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application. In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of "proximate cause."[13] See *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 649 (1969); *Karseal Corp.* v. *Richfield Oil Corp.*, 221

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[13] The traditional principle of proximate cause suggests the use of words such as "remote," "tenuous," "fortuitous," "incidental," or "consequential" to describe those injuries that will find no remedy at law. See, *e. g.*, *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F. 2d 414, 419 (CA4 1966). And the use of such terms only emphasizes that the principle of proximate cause is hardly a rigorous analytic tool. See, *e. g.*, *Palsgraf* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928); *id.*, at 351–352, 162 N. E., at 103 (Andrews, J., dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point"). It bears affirming that in identifying the limits of an explicit statutory remedy, legislative intent is the controlling consideration. Cf. *Mer-*

F. 2d 358, 363 (CA9 1955). In applying that elusive concept to this statutory action, we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

(1)

It is petitioners' position that McCready's injury is too "fortuitous" and too "incidental" to and "remote" from the alleged violation to provide the basis for a § 4 action.[14] At the outset, petitioners argue that because the alleged conspiracy was directed by its protagonists at psychologists, and not at subscribers to group health plans, only psychologists might maintain suit. This argument may be quickly disposed of.

We do not think that because the goal of the conspirators was to halt encroachment by psychologists into a market that

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rill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U. S. 353, 377–378 (1982); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16 (1979).

[14] In so arguing, petitioners advert to the "target area" test of antitrust standing that prevails in the Courts of Appeals for the First, Second, and Fifth Circuits. See, *e. g.*, *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F. 2d 539, 546 (CA5 1980); *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F. 2d 1, 18–19 (CA1 1979); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292 (CA2 1971). Petitioners place special reliance on the following frequently cited formulation of the "target area" principle:

"[I]n order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i. e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than being 'targets' themselves." *Id.*, at 1295.

physicians and psychiatrists sought to preserve for themselves, McCready's injury is rendered "remote." The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market.[15] McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S., at 489, quoting *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 125 (1969).

Petitioners next argue that even if the § 4 remedy might be available to persons other than the competitors of the conspirators, it is not available to McCready because she was not an economic actor in the market that had been restrained. In petitioners' view, the proximate range of the violation is limited to the sector of the economy in which a violation of the type alleged would have its most direct anticompetitive effects. Here, petitioners contend that that market, for purposes of the alleged conspiracy, is the market in group health care plans. Thus, in petitioners' view, standing to redress

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[15] Nor does the "target area" test applied by the Courts of Appeals "'imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages.'" See *Schwimmer* v. *Sony Corp. of America*, 637 F. 2d 41, 47–48 (CA2 1980), quoting *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d, at 220.

the violation alleged in this case is limited to participants in that market—that is, to entities, such as McCready's employer, who were purchasers of group health plans, but not to McCready as a beneficiary of the Blue Shield plan.[16]

Petitioners misconstrue McCready's complaint. McCready does not allege a restraint in the market for group health plans. Her claim of injury is premised on a concerted refusal to reimburse under a plan that was, in fact, purchased and retained by her employer for her benefit, and that as a matter of contract construction and state law permitted reimbursement for the services of psychologists without any significant variation in the structure of the contractual relationship between her employer and Blue Shield.[17] See n. 2, *supra*. As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, we think it clear that McCready was "within that area of the economy . . . endangered by [that] breakdown of competitive conditions"

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[16] Petitioners borrow selectively from *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977), in arguing that McCready's § 4 claim is "unrelated to any reduction in competition caused by the alleged boycott," because the injury she alleges "is the result of the terms of her insurance contract, and not the result of a reduction in competition." Brief for Petitioners 16. Extracting additional language from *Brunswick*, they argue that "McCready would have suffered the identical 'loss'—but no compensable 'injury' as long as her employer, which acted independently in an unrestrained market, continued to purchase a group insurance contract that did not cover the services of clinical psychologists." Brief for Petitioners 16–17 (footnote omitted).

[17] Nor do we think that her employer's decision to retain Blue Shield coverage despite its continued failure to reimburse for the services of a psychologist—or indeed, her employer's unexercised option to terminate that relationship—is an intervening cause of McCready's injury. Although her employer's decision to purchase the Blue Shield plan for her benefit was in some sense a factor that contributed independently to McCready's injury, her coverage under the Blue Shield plan may, at this stage of the litigation, properly be accepted as a given, and the proper focus in evaluating her entitlement to raise a § 4 damages claim is on Blue Shield's change in the terms of the plan to link reimbursement to a subscriber's choice of one group of psychotherapists over another.

resulting from Blue Shield's selective refusal to reimburse. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F. 2d 122, 129 (CA9 1973).

(2)

We turn finally to the manner in which the injury alleged reflects Congress' core concerns in prohibiting the antitrust defendants' course of conduct. Petitioners phrase their argument on this point in a manner that concedes McCready's participation in the market for psychotherapy services and rests instead on the notion that McCready's injury does not reflect the "anticompetitive" effect of the alleged boycott. They stress that McCready did not visit a psychiatrist whose fees were artificially inflated as a result of the competitive advantage he gained by Blue Shield's refusal to reimburse for the services of psychologists; she did not pay additional sums for the services of a physician to supervise and bill for the psychotherapy provided by her psychologist; and that there is no "claim that her psychologists' bills are higher than they would have been had the conspiracy not existed."[18] In promoting this argument, petitioners rely heavily on language in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*.

In *Brunswick*, respondents were three bowling centers who complained that petitioner's acquisition of several financially troubled bowling centers violated § 7 of the Clayton Act by lessening competition or tending to create a monopoly. In seeking damages, "respondents attempted to show that had petitioner allowed the [acquired] centers to close, respondents' profits would have increased." *Id.*, at 481. The Court of Appeals endorsed the legal theory upon which respondents' claim was based, *id.*, at 483, holding that "any loss 'causally linked' to 'the mere presence of the violator in the market'" was compensable under § 4, *id.*, at 487. We reversed, holding that the injury alleged by respondents was not of "'the type that the statute was intended to forestall.'"

[18] 649 F. 2d, at 236 (Widener, J., dissenting).

Id., at 487–488, quoting *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 202 (1967). Indeed, the Court noted that respondents sought in damages "the profits they would have realized had competition been *reduced*." 429 U. S., at 488 (emphasis added).

We can agree with petitioners' view of *Brunswick* as embracing the general principle that treble-damages recoveries should be linked to the procompetition policy of the antitrust laws. But petitioners seek to take *Brunswick* one significant step farther. In a passage upon which petitioners place much reliance, we stated:

> "[F]or plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S., at 125." *Id.*, at 489 (emphasis in original; footnote omitted).

Relying on this language, petitioners reason that McCready can maintain no action under § 4 because her injury "did not reflect the anticompetitive effect" of the alleged violation.

Brunswick is not so limiting. Indeed, as we made clear in a footnote to the relied-upon passage, a § 4 plaintiff need not "prove an actual lessening of competition in order to recover. [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." *Id.*, at 489, n. 14. Thus while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 po-

tentially offers redress, see *Reiter* v. *Sonotone Corp.*, 442 U. S. 330 (1979), that is not the only form of injury remediable under § 4. We think it plain that McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.

McCready charges Blue Shield with a purposefully *anticompetitive scheme*. She seeks to recover as damages the sums lost to her as the consequence of Blue Shield's attempt to pursue that scheme.[19] She alleges that Blue Shield sought to induce its subscribers into selecting psychiatrists over psychologists for the psychotherapeutic services they required,[20] and that the heart of its scheme was the offer of a Hobson's choice to its subscribers. Those subscribers were compelled to choose between visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice. In the latter case, the antitrust injury would have been borne in the first instance by the competitors of the conspirators, and inevitably—though indirectly—by the customers of the competitors in the form of suppressed competition in the psychotherapy market; in the former case, as it happened, the injury was borne directly by the customers of the competitors. McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. Although

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[19] *Brunswick* held that a claim of injury arising from the preservation or enhancement of competition is a claim "inimical to the purposes of [the antitrust] laws," 429 U. S., at 488. Most obviously, McCready's claim is quite unlike the claim asserted by the plaintiff in *Brunswick* for she does not seek to label increased competition as a harm to her. Nevertheless, we agree with petitioners that the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury under § 4.

[20] Or at the least, Blue Shield sought to compel McCready to employ the services of a physician in addition to those of a psychologist.

McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. In light of the conspiracy here alleged we think that McCready's injury "flows from that which makes defendants' acts unlawful" within the meaning of *Brunswick*, and falls squarely within the area of congressional concern.[21]

III

Section 4 of the Clayton Act provides a remedy to "[a]ny person" injured "by reason of" anything prohibited in the

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[21] JUSTICE REHNQUIST, dissenting, is of course correct in asserting that the "injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall," *post*, at 486. But JUSTICE REHNQUIST's dissent takes an unrealistically narrow view of those injuries with which the antitrust laws might be concerned, and offers not the slightest hint—beyond sheer *ipse dixit*—to help in determining what kinds of injury are not amenable to § 4 redress. For example, the dissent acknowledges that "a distributor who refused to go along with the retailers' conspiracy [to injure a disfavored retailer] and thereby lost the conspiring retailers' business would . . . have an action against those retailers," *post*, at 490. The dissent characterizes this circumstance as a "concerted refusal to deal," and is thus willing to acknowledge the existence of compensable injury. But the dissent's is not the only pattern of concerted refusals to deal. If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

McCready and the banker and the distributor are in many respects similarly situated. McCready alleges that she has been the victim of a concerted refusal by psychiatrists to reimburse through the Blue Shield plan. Because McCready is a consumer, rather than some other type of market participant, the dissent finds itself unwilling to acknowledge that she might have suffered a form of injury of significance under the antitrust laws. But under the circumstances of this case, McCready's participation in the market for psychotherapeutic services provides precisely that significance.

antitrust laws. We are asked in this case to infer a limitation on the rule of recovery suggested by the plain language of § 4. But having reviewed our precedents and, more importantly, the policies of the antitrust laws, we are unable to identify any persuasive rationale upon which McCready might be denied redress under § 4 for the injury she claims. The judgment of the Court of Appeals is

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Respondent's alleged "antitrust injury" in this case arises from a health insurance coverage dispute with her insurer, petitioner Blue Shield of Virginia. Respondent's complaint is that Blue Shield reimburses its subscribers for treatment by psychiatrists, but not by psychologists unless their services are supervised and billed by treating physicians. Respondent was treated by a clinical psychologist, but when she submitted claims to Blue Shield, she was denied reimbursement.

Respondent alleged in her complaint that Blue Shield's refusal to reimburse her for the costs she incurred in obtaining the services of a psychologist furthered a conspiracy by petitioners "to exclude and boycott clinical psychologists from receiving compensation under" Blue Shield's plan. App. 55. Blue Shield's refusal-to-reimburse policy is alleged to constitute a form of economic pressure on McCready and other Blue Shield subscribers to obtain the services of psychiatrists rather than psychologists. By employing this economic pressure on Blue Shield subscribers, petitioners are alleged to have placed clinical psychologists at a competitive disadvantage with regard to psychiatrists in the market for insurance-reimbursed psychological services.

The Court concludes that McCready's inability to obtain reimbursement for the psychological services she actually obtained permits her to maintain an action to enforce the anti-

trust laws pursuant to § 4 of the Clayton Act. According to the Court, one who suffers economic loss as a necessary step in effecting the end of a conspiracy has "standing" to sue pursuant to § 4. *Ante*, at 479, 483–484. I disagree.

Section 4 of the Clayton Act authorizes suits for treble damages by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U. S. C. § 15. It is not enough, however, for a plaintiff merely to allege that the defendant violated the antitrust laws and that he was injured. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 486–489 (1977). See *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 263, n. 14 (1972). The injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, at 487–488.

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" 429 U. S., at 489 (citation omitted).

Although McCready alleges that she would have been reimbursed had it not been for the conspiracy, I do not think that she has made a sufficient allegation of "antitrust injury" within the meaning of *Brunswick*.

Standing alone, a refusal by an insurer to reimburse its insured does not constitute a violation of the Sherman Act. At most, such an action on the part of an insurer may amount to a breach of a contract or a violation of relevant state law regulating the insurance industry.[1] According to the Court,

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[1] In addition to the antitrust claim, McCready's complaint asserts a claim for breach of contract under the principles of pendent jurisdiction.

however, what distinguishes this case from the typical insurance coverage dispute is either the *purpose* behind or the *effect* of Blue Shield's refusal to reimburse. If Blue Shield violated the antitrust laws by its nonreimbursement policy, it was only because that policy was used as a *means* of putting psychologists at a competitive disadvantage in relation to psychiatrists.

Two conceivable grounds therefore may be divined from the Court's opinion to support its conclusion that McCready has suffered "antitrust injury" when Blue Shield refused to reimburse her costs in obtaining the services of a psychologist. The first theory is that McCready may recover simply because petitioners' nonreimbursement policy was *intended* to put clinical psychologists at a competitive disadvantage. According to the Court, this must be so even if Blue Shield's refusal to reimburse her would be entirely legal under the antitrust laws in the absence of such a purpose to competitively injure third parties. Blue Shield's intent or purpose renders the discriminatory reimbursement policy illegal. Under this theory, it would seem to be irrelevant for the Court's purposes whether McCready obtained the services of a psychologist or a psychiatrist so long as the illegal intent is present and she suffered economic loss as a result.[2]

The second conceivable rationale is a flat rule that recovery is permitted by those persons who suffer economic loss as a necessary step in effecting a conspiracy to place third par-

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App. 57–58. She also alleges that Blue Shield's policy contravened state law. *Id.*, at 55–56.

[2] The Court explains that those subscribers, such as McCready, who did not yield to Blue Shield's coercive pressures suffer from Blue Shield's sanctions by way of increased costs in obtaining the services of a psychologist. Those subscribers who did yield to Blue Shield's pressure suffer antitrust injury indirectly because of suppressed competition in the psychotherapy market. *Ante*, at 483–484. I do not understand the Court to conclude that *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), would not bar recovery by a subscriber, as opposed to a psychologist, in the latter situation.

ties at a competitive disadvantage.[3] Under this theory, McCready may recover merely by demonstrating that she was a "tool" of petitioners' effort to disable psychologists from competing with psychiatrists in the market for insurance-reimbursed psychological services. She may recover because she did not yield to the economic pressure imposed on her.[4] The theory is that McCready may recover because her loss is linked to petitioners' efforts to enforce a "boycott" of third parties.

I believe that such reasoning is foreclosed by the Court's decision in *Brunswick*. In order to recover, a plaintiff must demonstrate that the nature of the injury *he suffered* is of the type that makes the challenged practice illegal. In *Brunswick*, the merger may well have violated § 7 of the Clayton Act in the abstract or even as to competitors not before the Court. Yet, we held that the plaintiffs in *Brunswick* could not recover because they did not suffer from the *anticompetitive* effects of the merger. We rejected the contention that it was sufficient to show merely that the defendant's merger violated § 7 and that there existed a causal link between that merger and an economic loss. 429 U. S., at 486–489. In-

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[3] The Court suggests a third theory—that McCready has standing herself as a target of a concerted refusal to deal. See *ante*, at 484, n. 21; *infra*, at 490–491.

[4] In order to recover under this theory, it would seem that respondent must prove at trial that she actually refused to yield to the economic pressure created by Blue Shield's reimbursement policy. If she decided to obtain the services of a psychologist rather than a psychiatrist without knowing of Blue Shield's policy, it cannot be said that her "injury" was proximately related to petitioners' alleged anticompetitive conduct. If she discovered the policy only after she sought reimbursement, then it cannot be said that Blue Shield's policy had any effect on McCready's conduct as a consumer in the market for psychotherapeutic services. This, of course, is not to say that a person in all circumstances must have knowledge of a defendant's anticompetitive activities before one may challenge that activity. One may not be a victim of economic pressure, however, if one acted obliviously to that pressure.

stead, the required showing is that the type of harm suffered by the plaintiff is that which makes the challenged practice illegal. *Id.*, at 489.

Therefore, McCready may not recover merely by showing that she has suffered an economic loss resulting from a practice the legality of which depends upon its effect on a third party. McCready must show that the challenged practice is illegal with regard to its effect upon her. But petitioners' policy is alleged to be illegal not by virtue of its effect upon Blue Shield's subscribers but because of its effect upon psychologists. McCready alleges no anticompetitive effect upon herself. She does not allege that the conspiracy has affected the *availability* of the psychological services she sought and actually obtained. Nor does she allege that the conspiracy affected the *price* of the treatment she received.[5] She does not allege that her injury was caused by any reduction in competition between psychologists and psychiatrists, nor that it was the result of any *success*[6] Blue Shield achieved in its "boycott" of psychologists. She seeks recovery solely on the basis that Blue Shield's reimbursement policy *failed* to alter her conduct in a fashion necessary to foreclose psychologists from obtaining the patronage of Blue Shield's subscribers.

If the important consideration is whether the challenged practice is illegal with regard to its effect on the plaintiff, then it would be irrelevant for the plaintiff's purposes that the conspiracy might also adversely affect competition on another level of the market. For example, a group of retailers

[5] By excluding psychologists from the market, psychiatrists may well be able to increase their charges for psychotherapeutic services, which in turn, may raise the insurance rates charged by Blue Shield. McCready, however, alleges no such injury to herself on this theory.

[6] Because McCready obtained the services of a psychologist, it cannot be said that the psychologists were injured by the economic pressure Blue Shield placed on McCready and the class of subscribers she represents. See *ante*, at 475.

may threaten to refuse to do business with those distributors that continue to do business with a disfavored retailer. If the distributors agreed to cooperate with the conspiring retailers, then the disfavored retailer would have an action against the agreeing distributors and the conspiring retailers. See, *e. g.*, *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). I would think that a distributor who refused to go along with the retailers' conspiracy and thereby lost the conspiring retailers' business would also have an action against those retailers. Such an action would be based upon the conspirators' concerted refusal to deal with the distributor which *itself* would be unlawful under the antitrust laws. Such an action, unlike the instant case, would not depend upon the anticompetitive effect of the challenged practice upon a third party. The distributor would have an action not on the ground that he was caught in the middle of an attempted boycott of participants on another level of the market, but because *he* was boycotted. The boycott of the distributor puts him at a competitive disadvantage to those distributors who are unaffected by the retailers' conspiracy and to those distributors who agree to participate.[7]

McCready, however, does not allege that petitioners engaged in a concerted refusal to deal with *her*. As the Court is aware, *ante*, at 468–470, McCready has alleged that petitioners

[7] As pointed out by the Court, a concerted refusal to deal may take many forms. *Ante*, at 484, n. 21. I would agree that the bank could sue in the Court's hypothetical because, as conceded by the Court, the bank's ability to compete with other banks would be adversely affected. By contrast, my disagreement with the Court is that it permits McCready to sue solely because of an injury to a level of the market in which she does not participate. Moreover, McCready does not allege that petitioners' conspiracy adversely affected competition between psychologists and psychiatrists in such a manner as to adversely affect the price or supply of psychotherapeutic services available to her as a consumer. Thus, McCready's case is clearly distinguishable from that of the bank's in the Court's hypothetical.

violated the antitrust laws by conspiring to exclude clinical psychologists from the coverage of Blue Shield plans, and that this conspiracy foreseeably injured her. The Court apparently concludes, however, that McCready has also sufficiently alleged that petitioners have engaged in a concerted refusal to deal with *her*, and that this is the gravamen of her antitrust complaint: "McCready alleges that she has been the victim of a concerted refusal by psychiatrists to reimburse through the Blue Shield plan." *Ante*, at 484, n. 21. It may be that the Court today is merely holding that a boycottee has "standing" to sue under § 4. Were this the issue presented by this case, I have little doubt that the Court merely would have denied certiorari.

But McCready simply does not, and could not, claim standing as the target of a concerted refusal to deal. Neither Blue Shield nor the psychiatrists threatened to cease doing business with McCready if she obtained the services of a psychologist rather than a psychiatrist. McCready alleges only that under the Blue Shield policy she could not obtain reimbursement for services rendered by psychologists. If such a claim is sufficient to make out a concerted refusal to deal, then any consumer who could not obtain a product or service on the precise terms he desires could claim to be the victim of a "boycott." Most importantly, McCready alleges that Blue Shield's policy violates the antitrust laws only by virtue of its anticompetitive effect on *psychologists*. She does not allege that Blue Shield's policy is illegal in any way because of its effect on *subscribers*.

The Court, however, dismisses such concerns by stating in conclusory terms that "the injury [McCready] suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Ante*, at 484. I trust that the Court is not holding that a plaintiff may escape dismissal of the complaint merely by alleging that he suffered an economic loss "inextricably

intertwined" with an injury the defendants intended, but failed, to inflict upon a third party.[8] Although the Court may view itself as successfully deciding this case on its peculiar facts, it has wholly failed to provide any sort of reasoned basis for its decision. Especially in the area of antitrust law, labels do not suffice when analysis is necessary.

I would reverse the judgment of the Court of Appeals because McCready has not alleged that she has suffered antitrust injury, but at best injury attributable to a breach of contract on the part of Blue Shield.

JUSTICE STEVENS, dissenting.

Respondent is a consumer of psychotherapeutic services. The question is whether she has been injured in her "business or property by reason of anything forbidden in the antitrust laws."[1] The alleged antitrust violation is an agreement between petitioners Neuropsychiatric Society of Virginia and Blue Shield that Blue Shield would refuse to reimburse subscribers for payments made to clinical psychologists for charges that were not billed through a physician. The objective of the alleged conspiracy was to induce subscribers to patronize psychiatrists instead of psychologists.

For purposes of decision, I assume that the alleged agreement is unlawful. In analyzing the sufficiency of respondent's damage claim, it is helpful first to consider the situation

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[8] If McCready's injury were truly "inextricably intertwined" with any injury actually suffered by the psychologists, the risk of duplicative recovery and the practical problems inherent in distinguishing the loss suffered by her from the loss suffered by the psychologists may mean that either subscribers or psychologists, but not both, may recover. See *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977).

[1] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.

in which the conspiracy would have its maximum impact on the relevant market. Given their objective, petitioners' conspiracy would be most effective if they made it perfectly clear to subscribers that they would not be reimbursed if they consulted psychologists instead of psychiatrists. For without this information, a subscriber's choice between a psychologist and a psychiatrist would not be affected by the conspiracy. Thus, I first assume that the Blue Shield insurance policy did not cover services performed by psychologists and that subscribers as a class were fully aware of this exclusion.

On this assumption, a Blue Shield subscriber who is a potential consumer in the relevant market has at least three options. He may: (1) forgo treatment entirely; (2) go to a psychiatrist; or (3) go to a psychologist.[2] If he exercises his first option, his illness may worsen but he will not have suffered any economic injury cognizable under the antitrust laws.[3] If he exercises his second option, his property will not be diminished because Blue Shield will reimburse him for his payment to the psychiatrist. If he exercises his third option, his property will be diminished to the extent of his unreimbursed payment to the psychologist, but he will have received in exchange psychotherapeutic services that pre-

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[2] In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, we held that antitrust injury was limited to "'the type of loss that the claimed violations . . . would be likely to cause.'" *Id.*, at 489 (quoting *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 125). I would expect that the alleged violation in this case would be most likely to cause knowledgeable members of the class of potential consumers of psychotherapeutic services to exercise either the first or the second option. It is fair to assume that the third situation—the one in which respondent finds herself—would be "unlikely" to result.

[3] The subscriber may have to undergo more extensive treatment later if he forgoes treatment now and his illness worsens. Any consequential economic injury, however, would no more constitute antitrust injury than the economic injury suffered by a consumer who decides to forgo a purchase on the ground that the price of the goods or services was fixed at an artificially high level.

sumably were worth the payment.[4] The fact that he voluntarily elected to spend money for services not covered by his insurance policy would have no greater legal significance than a similar voluntary decision by a person who was not a Blue Shield subscriber.[5] It thus seems clear to me that whatever option the fully informed subscriber exercises, he would suffer no injury to his property by reason of the restriction of insurance coverage to psychotherapeutic services performed by psychiatrists.

This conclusion is reinforced by the fact that Blue Shield subscribers have the additional option of going to a psychologist while retaining their rights to reimbursement under the policy. According to respondent's complaint, Blue Shield did not refuse to reimburse all payments made by subscribers to psychologists, but only those payments not billed through a physician. Even if a fully informed subscriber's preference for psychologists over psychiatrists were protected by the antitrust laws, that preference was not denied by the antitrust violation alleged in this case.[6] The Hobson's choice de-

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[4] If treatment by a psychiatrist and treatment by a psychologist were fungible, then a subscriber who exercised this third option effectively would be paying twice for the psychotherapeutic service, once to the insurer in premiums and once to the psychologist in an unreimbursable payment. But the subscriber's exercise of this option presumably indicates that treatment by a psychologist is more valuable to him than treatment by a psychiatrist. If that be true, the subscriber is in the same situation as any policyholder who desires a service for which he has not purchased insurance.

[5] If the subscriber would purchase a service that was covered by the Blue Shield policy, such as a surgical operation, then he would be reimbursed by Blue Shield for that payment. If respondent's antitrust claim is that petitioners have engaged in an unlawful boycott, it therefore is manifest that respondent is not the boycottee. For petitioners have not refused to deal with respondent—they offer her the same coverage as any other subscriber or potential subscriber.

[6] Presumably, the charge (if any) of the referring physician would be reimbursable under the policy. In any event, the complaint does not claim damages based on any such unreimbursed charge.

scribed by the Court, *ante*, at 483, simply does not fit this case.

The availability of this fourth option would seem to indicate that respondent, in fact, was not fully aware of the scope of her policy's coverage. If her lack of understanding was caused by fraud or deception, she should be able to recover in a common-law action. If the misunderstanding was her own fault, that circumstance should not provide a basis for an antitrust recovery that would not be available if she had been fully informed.

Nor is the deficiency in respondent's complaint cured if the assumption about the insurance coverage is reversed. Although her antitrust claim would be more credible if Blue Shield excluded coverage of services performed by psychologists, respondent alleged in the second count of her complaint that the insurance policy, properly construed under applicable principles of Virginia law, provided coverage for services performed by psychologists, but that Blue Shield nevertheless refused to reimburse her for the payments she made to her psychologist. If a subscriber does not suffer antitrust injury when the insurance policy excludes coverage of services performed by psychologists, it would be anomalous to conclude that the availability of a breach-of-contract claim would in any way enhance his standing. The right to recover under the federal antitrust laws cannot be derived from a right to recover under state law.

Because respondent's complaint discloses no basis for concluding that she has suffered an injury to her property by reason of the alleged antitrust violation, I respectfully dissent.

PATSY *v.* BOARD OF REGENTS OF THE STATE OF FLORIDA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80–1874. Argued March 2, 1982—Decided June 21, 1982

Petitioner filed an action in Federal District Court under 42 U. S. C. § 1983 for declaratory or injunctive relief or damages, alleging that respondent employer had denied her employment opportunities solely on the basis of her race and sex. The District Court granted respondent's motion to dismiss because petitioner had not exhausted available state administrative remedies. The Court of Appeals vacated, holding that a § 1983 plaintiff could be required to exhaust administrative remedies if certain specified conditions were met, and remanded the case to the District Court to determine whether exhaustion would be appropriate in the instant case.

Held: Exhaustion of state administrative remedies is not a prerequisite to an action under § 1983. Pp. 500–516.

(a) This conclusion is supported by the legislative histories of both § 1983 and 42 U. S. C. § 1997e (1976 ed., Supp. IV), which carves out a narrow exception to the general no-exhaustion rule established in this Court's prior decisions by creating a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983. A judicially imposed exhaustion requirement in cases other than adult prisoners' cases would be inconsistent with Congress' decision to adopt § 1997e, would usurp policy judgments that Congress has reserved for itself, and would also be inconsistent with the detailed exhaustion scheme embodied in § 1997e. Pp. 502–512.

(b) Even if, as respondent argues, an exhaustion requirement would lessen the burden that § 1983 actions impose on federal courts, would further the goal of comity and improve federal-state relations, and would enable the state agency to enlighten the federal court's ultimate decision, these are policy considerations that alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent. Moreover, difficult questions concerning the design and scope of an exhaustion requirement, which might be answered swiftly and surely by legislation, would create costly, remedy-delaying and court-burdening litigation if answered by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies. Pp. 512–515.

634 F. 2d 900, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and in all but Part III–B of which WHITE, J., joined. O'CONNOR, J., filed a concurring opinion, in which REHNQUIST, J., joined, *post*, p. 516. WHITE, J., filed an opinion concurring in part, *post*, p. 517. POWELL, J., filed a dissenting opinion, in Part II of which BURGER, C. J., joined, *post*, p. 519.

Charles S. Sims argued the cause for petitioner. With him on the briefs were *Bruce J. Ennis, Jr.*, *E. Richard Larson*, *Steven R. Shapiro*, and *Joel M. Gora*.

Mitchell D. Franks argued the cause for respondent. With him on the brief was *Jeffrey H. Klink*.*

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*Briefs of *amici curiae* urging reversal were filed by *Jack Greenberg*, *James M. Nabrit III*, *Bill Lann Lee*, and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc.; and by *Ellen Josephson* and *Steven H. Steinglass* for the National Legal Aid and Defender Association.

Briefs of *amici curiae* urging affirmance were filed by *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak* for Americans for Effective Law Enforcement, Inc.; and by *John C. Ross, Jr.*, for the Texas Municipal League et al.

Briefs of *amici curiae* were filed for the State of Washington et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, *Malachy R. Murphy*, Deputy Attorney General, and *Thomas R. Bjorgen*, Assistant Attorney General, and the Attorneys General for their respective States or jurisdictions as follows: *Aviata F. Faalevad* of American Samoa, *Charles A. Graddick* of Alabama, *Wilson L. Condon* of Alaska, *Robert Corbin* of Arizona, *Michael J. Bowers* of Georgia, *Tany S. Hong* of Hawaii, *David H. Leroy* of Idaho, *Tyrone C. Fahner* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *Steven L. Beshear* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Warren R. Spannaus* of Minnesota, *William A. Allain* of Mississippi, *John D. Ashcroft* of Missouri, *Michael T. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Richard H. Bryan* of Nevada, *Gregory H. Smith* of New Hampshire, *James R. Zazzali* of New Jersey, *Rufus L. Edmisten* of North Carolina, *Robert O. Wefald* of North Dakota, *William J. Brown* of Ohio, *LeRoy S. Zimmerman* of Pennsylvania, *Dennis J. Roberts II* of Rhode Island, *Daniel R. McLeod* of South Carolina, *Mark White* of Texas, *David L. Wilkinson* of Utah, *John J. Easton, Jr.*, of Vermont, *Chauncey H. Browning, Jr.*, of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Steven F. Freudenthal* of Wyoming; and for the National Education Association et al. by *Michael H. Gottesman*, *Robert M. Weinberg*, *Jeremiah A. Collins*, *Richard C. Dinkelspiel*, *William L. Robinson*, and *Norman J. Chachkin*.

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U. S. C. § 1983 (1976 ed., Supp. IV). Petitioner Georgia Patsy filed this action, alleging that her employer, Florida International University (FIU), had denied her employment opportunities solely on the basis of her race and sex. By a divided vote, the United States Court of Appeals for the Fifth Circuit found that petitioner was required to exhaust "adequate and appropriate" administrative remedies, and remanded the case to the District Court to consider the adequacy of the administrative procedures. *Patsy* v. *Florida International University*, 634 F. 2d 900 (1981) (en banc). We granted certiorari, 454 U. S. 813, and reverse the decision of the Court of Appeals.

I

Petitioner alleges that even though she is well qualified and has received uniformly excellent performance evaluations from her supervisors, she has been rejected for more than 13 positions at FIU.[1] She further claims that FIU has unlawfully filled positions through intentional discrimination on the basis of race and sex. She seeks declaratory and injunctive relief or, in the alternative, damages.[2]

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[1] Because this case is here on a motion to dismiss, we accept as true the factual allegations in petitioner's amended complaint. In her initial complaint, petitioner named FIU as the defendant. Relying on *Byron* v. *University of Florida*, 403 F. Supp. 49 (ND Fla. 1975), the District Court granted FIU's motion to dismiss, holding that the Board of Regents and not the individual university had the capacity to sue and be sued under Florida law. The District Court granted petitioner leave to amend, and she amended her complaint to name the Board of Regents "on behalf of" FIU.

[2] Petitioner requested the District Court to "[r]equire Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for

The United States District Court for the Southern District of Florida granted respondent Board of Regents' motion to dismiss because petitioner had not exhausted available administrative remedies. On appeal, a panel of the Court of Appeals reversed, and remanded the case for further proceedings. *Patsy* v. *Florida International University*, 612 F. 2d 946 (1980). The full court then granted respondent's petition for rehearing and vacated the panel decision.

The Court of Appeals reviewed numerous opinions of this Court holding that exhaustion of administrative remedies was not required, and concluded that these cases did not preclude the application of a "flexible" exhaustion rule. 634 F. 2d, at 908. After canvassing the policy arguments in favor of an exhaustion requirement, the Court of Appeals decided that a § 1983 plaintiff could be required to exhaust administrative remedies if the following minimum conditions are met: (1) an orderly system of review or appeal is provided by statute or agency rule; (2) the agency can grant relief more or less commensurate with the claim; (3) relief is available within a reasonable period of time; (4) the procedures are fair, are not unduly burdensome, and are not used to harass or discourage those with legitimate claims; and (5) interim relief is available, in appropriate cases, to prevent irreparable injury and to preserve the plaintiff's rights during the administrative process. Where these minimum standards are met, a court must further consider the particular administrative scheme, the nature of the plaintiff's interest, and the values served by the exhaustion doctrine in order to determine whether exhaustion should be required. *Id.*, at 912–913. The Court of Appeals remanded the case to the

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which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of $500,000 as actual and exemplary damages." Record 47. Petitioner also requested that the District Court "order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination complained of herein." *Id.*, at 48.

District Court to determine whether exhaustion would be appropriate in this case.

II

The question whether exhaustion of administrative remedies should ever be required in a § 1983 action has prompted vigorous debate and disagreement. See, *e. g.*, Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Cases in the Federal Courts, 92 Harv. L. Rev. 610 (1979); Note, 8 Ind. L. Rev. 565 (1975); Comment, 41 U. Chi. L. Rev. 537 (1974). Our resolution of this issue, however, is made much easier because we are not writing on a clean slate. This Court has addressed this issue, as well as related issues, on several prior occasions.

Respondent suggests that our prior precedents do not control our decision today, arguing that these cases can be distinguished on their facts or that this Court did not "fully" consider the question whether exhaustion should be required. This contention need not detain us long. Beginning with *McNeese* v. *Board of Education*, 373 U. S. 668, 671–673 (1963), we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. See *Barry* v. *Barchi*, 443 U. S. 55, 63, n. 10 (1979); *Gibson* v. *Berryhill*, 411 U. S. 564, 574 (1973); *Carter* v. *Stanton*, 405 U. S. 669, 671 (1972); *Wilwording* v. *Swenson*, 404 U. S. 249, 251 (1971); *Houghton* v. *Shafer*, 392 U. S. 639, 640 (1968); *King* v. *Smith*, 392 U. S. 309, 312, n. 4 (1968); *Damico* v. *California*, 389 U. S. 416 (1967). Cf. *Steffel* v. *Thompson*, 415 U. S. 452, 472–473 (1974) ("When federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this Court has stated

categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*. Therefore, we do not address the question presented in this case as one of first impression.

III

Respondent argues that we should reconsider these decisions and adopt the Court of Appeals' exhaustion rule, which was based on *McKart* v. *United States*, 395 U. S. 185 (1969). This Court has never announced a definitive formula for determining whether prior decisions should be overruled or reconsidered. However, in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 695–701 (1978), we articulated four factors that should be considered. Two of these factors—whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history and whether overruling these decisions would be inconsistent with more recent expressions of congressional intent—are particularly relevant to our decision today.[3] Both concern legislative purpose, which is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court

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[3] The other factors discussed in *Monell*—whether the decisions in question constituted a departure from prior decisions and whether overruling these decisions would frustrate legitimate reliance on their holdings—do not support overruling these decisions. *McNeese* was not a departure from prior decisions—this Court had not previously addressed the application of the exhaustion rule to § 1983 actions. Overruling these decisions might injure those § 1983 plaintiffs who had forgone or waived their state administrative remedies in reliance on these decisions.

should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.[4] Therefore, in deciding whether we should reconsider our prior decisions and require exhaustion of state administrative remedies, we look to congressional intent as reflected in the legislative history of the predecessor to § 1983 and in recent congressional activity in this area.

A

In determining whether our prior decisions misconstrued the meaning of § 1983, we begin with a review of the legislative history to § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983.[5] Although we recognize that the 1871 Congress did not expressly contemplate the exhaustion question, we believe that the tenor of the debates over § 1 supports our conclusion that exhaustion of administrative remedies in § 1983 actions should not be judicially imposed.

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[4] Congressional intent is important in determining the application of the exhaustion doctrine to cases in which federal administrative remedies are available, as well as to those in which state remedies are available. Of course, exhaustion is required where Congress provides that certain administrative remedies shall be exclusive. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Even where the statutory requirement of exhaustion is not explicit, courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme. In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress. See *McKart* v. *United States*, 395 U. S. 185, 193–195 (1969). With state administrative remedies, the focus is not so much on the role assigned to the state agency, but the role of the state agency becomes important once a court finds that deferring its exercise of jurisdiction is consistent with statutory intent.

[5] Some of the debates relating to § 2, which created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, aimed primarily at the Ku Klux Klan, are also relevant to our discussion of § 1.

The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. As we recognized in *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U. S. 339, 346 (1880)), "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"

At least three recurring themes in the debates over § 1 cast serious doubt on the suggestion that requiring exhaustion of state administrative remedies would be consistent with the intent of the 1871 Congress. First, in passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights. Representative Dawes expressed this view as follows:

> "The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution." Cong. Globe, 42d Cong., 1st Sess., 476 (1871) (hereinafter Globe).

See also *id.*, at 332 (remarks of Rep. Hoar); *id.*, at 375 (remarks of Rep. Lowe); *id.*, at 448–449 (remarks of Rep. Butler); *id.*, at 459 (remarks of Rep. Coburn).[6]

The 1871 Congress intended § 1 to "throw open the doors of the United States courts" to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, *id.*, at 376 (remarks of Rep. Lowe), and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary. For example, Senator Edmunds, who introduced the bill in the Senate, stated in his closing remarks that the bill was similar in principle to an earlier act upheld by this Court in *Prigg* v. *Pennsylvania*, 16 Pet. 539 (1842):

> "[T]he Supreme Court decided . . . that it was the solemn duty of Congress under the Constitution to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him, and that *there should be no intermediate authority to arrest or oppose the direct performance of this duty by Congress.*" Globe 692 (emphasis added).

Similarly, Representative Elliott viewed the issue as whether "the Government of the United States [has] the right, under the Constitution, to protect a citizen in the exercise of his vested rights as an American citizen by . . . *the assertion of immediate jurisdiction through its courts*, without the appeal or agency of the State in which the citizen is domi-

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[6] Opponents of the bill also recognized this purpose and complained that the bill would usurp the States' power, centralize the government, and perhaps ultimately destroy the States. See, *e. g.*, Globe 337, 338 (remarks of Rep. Whitthorne); *id.*, at 352 (remarks of Rep. Beck); *id.*, at 361 (remarks of Rep. Swann); *id.*, at 365 (remarks of Rep. Arthur); *id.*, at 385 (remarks of Rep. Lewis); *id.*, at 429, 431 (remarks of Rep. McHenry); *id.*, at 454 (remarks of Rep. Cox); *id.*, at 510, 511 (remarks of Rep. Eldridge); Cong. Globe, 42d Cong., 1st Sess., App. 46 (1871) (remarks of Rep. Kerr) (hereinafter Globe App.); *id.*, at 216 (remarks of Sen. Thurman); *id.*, at 243 (remarks of Sen. Bayard).

ciled." *Id.*, at 389 (emphasis added). See, *e. g.*, *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 807 (remarks of Rep. Garfield); *id.*, at 609 (remarks of Sen. Pool); Globe App. 141 (remarks of Rep. Shanks).[7]

A second theme in the debates further suggests that the 1871 Congress would not have wanted to impose an exhaustion requirement. A major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights. See, *e. g.*, Globe 321 (remarks of Rep. Stoughton) ("The State authorities and local courts are unable or unwilling to check the evil or punish the criminals"); *id.*, at 374 (remarks of Rep. Lowe) ("the local administrations have been found inadequate or unwilling to apply the proper corrective"); *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 609 (remarks of Sen. Pool); *id.*, at 687 (remarks of Sen. Shurz); *id.*, at 691 (remarks of Sen. Edmunds); Globe App. 185 (remarks of Rep. Platt).[8]

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[7] Opponents criticized this provision on this very ground. For example, Representative Storm lamented:

"[Section one] does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning." *Id.*, at 86.

See also Globe 416 (remarks of Rep. Biggs) ("for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding"); *id.*, at 337 (remarks of Rep. Whitthorne); *id.*, at 373 (remarks of Rep. Archer); Globe App. 216 (remarks of Sen. Thurman).

[8] This view was expressed in the Presidential message urging the passing of corrective legislation. See Globe 244 ("That the power to correct these evils is beyond the control of State authorities I do not doubt") (message of President Grant). The inability of state authorities to protect constitutional rights was also expressed in the findings of the House Judiciary Committee, which had been directed to investigate the situation. See

Of primary importance to the exhaustion question was the mistrust that the 1871 Congress held for the factfinding processes of state institutions. See, *e. g.*, Globe 320 (testimony of Hon. Thomas Settle, Justice of the North Carolina Supreme Court, before the House Judiciary Committee) ("The defect lies not so much with the courts as with the juries"); *id.*, at 394 (remarks of Rep. Rainey); Globe App. 311 (remarks of Rep. Maynard). This Congress believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of the state courts. See, *e. g.*, Globe 322 (remarks of Rep. Stoughton); *id.*, at 459 (remarks of Rep. Coburn).[9] This perceived defect in the States' factfinding processes is particularly relevant to the question of exhaustion of administrative remedies: exhaustion rules are often applied in deference to the superior factfinding ability of the relevant administrative agency. See, *e. g.*, *McKart* v. *United States*, 395 U. S., at 192–196.

A third feature of the debates relevant to the exhaustion question is the fact that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief. Cf. *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"). For example, Senator Thurman noted:

> "I object to [§ 1], first, because of the centralizing tendency of transferring all mere private suits, as well as

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id., at 320. The resolution introduced by Senator Sherman instructing the Senate Judiciary Committee to report a bill expressed a similar view. See Globe App. 210 (state "courts are rendered utterly powerless by organized perjury to punish crime").

[9] Opponents viewed the bill as a declaration of mistrust for state tribunals. See, *e. g.*, Globe 361 (remarks of Rep. Swann); *id.*, at 397 (remarks of Rep. Rice); *id.*, at 454 (remarks of Rep. Cox); Globe App. 216 (remarks of Sen. Thurman). Representative McHenry found particularly offensive the removal of the factfinding function from the local institutions. See Globe 429.

> the punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been the least injured, but who has some malice to gratify, will be the most likely to avail himself of." Globe App. 216.

See also Globe 578, 694–695 (remarks of Sen. Edmunds); *id.*, at 334 (remarks of Rep. Hoar); *id.*, at 514 (remarks of Rep. Farnworth); Globe App. 85 (remarks of Rep. Bingham) ("Admitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action?").

This legislative history supports the conclusion that our prior decisions, holding that exhaustion of state administrative remedies is not a prerequisite to an action under § 1983, did not misperceive the statutory intent: it seems fair to infer that the 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under § 1 of the Civil Rights Act. We recognize, however, that drawing such a conclusion from this history alone is somewhat precarious: the 1871 Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies. Therefore, we do not rely exclusively on this legislative history in deciding the question presented here. Congress addressed the question of exhaustion under § 1983 when it recently enacted 42 U. S. C. § 1997e (1976 ed., Supp. IV). The legislative history of § 1997e provides strong evidence of congressional intent on this issue.

B

The Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV), was enacted pri-

marily to ensure that the United States Attorney General has "legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons." H. R. Conf. Rep. No. 96–897, p. 9 (1980) (Conf. Rep.). In § 1997e, Congress also created a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983. Section 1997e and its legislative history demonstrate that Congress understood that exhaustion is not generally required in § 1983 actions, and that it decided to carve out only a narrow exception to this rule. A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.

In considering whether an exhaustion requirement should be incorporated into the bill, Congress clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law. Witnesses testifying before the Subcommittee that drafted the bill discussed the decisions of this Court holding that exhaustion was not required. See, *e. g.*, Hearings on H. R. 2439 and H. R. 5791 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess., 20 (1977) (1977 Hearings); *id.*, at 47, 69, 77, 323; Hearings on H. R. 10 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 1st Sess., 48 (1979) (1979 Hearings). During these hearings, Representative Kastenmeier, Chairman of this Subcommittee, stated:

> "Another thing that I think requires some discussion within the committee, and is a point of argument, . . . is whether there ought to be an exhaustion of remedies requirement.
>
> ". . . In fact, I think it has been pointed out that if [we] were to require it, particularly in 1983, that would constitute regression from the current state of the law. It would set the law back, because presently it is clearly

> held, that is the Supreme Court has held, that in 1983 civil rights suits the litigant need not necessarily fully exhaust State remedies." 1977 Hearings 57–58.

See also *id.*, at 272 (remarks of Rep. Drinan) (Representative Railsback "grounds his bill on doing something which the Supreme Court has consistently refused to do, namely require exhaustion of remedies"); 1979 Hearings 26 (remarks of Rep. Kastenmeier) (adopting § 1997e "was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983").

The debates over adopting an exhaustion requirement also reflect this understanding. See, *e. g.*, 124 Cong. Rec. 11988 (1978) (remarks of Rep. Volkmer and Rep. Kastenmeier); *id.*, at 15445 (remarks of Rep. Ertel); *id.*, at 23180 (remarks of Rep. Wiggins) ("it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action"); 125 Cong. Rec. 12496 (1979) (remarks of Rep. Butler) ("Under existing law there is no requirement that a complainant first ask the State prison system to help him"). With the understanding that exhaustion generally is not required, Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures. See, *e. g.*, Conf. Rep. 9; 124 Cong. Rec. 11976 (1978) (remarks of Rep. Kastenmeier); *id.*, at 11976, 11983 (remarks of Rep. Railsback); *id.*, at 15442 (remarks of Rep. Kastenmeier); *id.*, at 15445 (remarks of Rep. Ertel); *id.*, at 23176 (remarks of Rep. Kastenmeier); *id.*, at 23179–23180 (remarks of Rep. Butler); *id.*, at 23180 (remarks of Rep. Ertel). Implicit in this decision is Congress' conclusion that the no-exhaustion rule should be left standing with respect to other § 1983 suits.

A judicially imposed exhaustion requirement would also be inconsistent with the extraordinarily detailed exhaustion

scheme embodied in § 1997e. Section 1997e carves out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and establishes a procedure to ensure that the administrative remedies are adequate and effective. The exhaustion requirement is expressly limited to § 1983 actions brought by an adult convicted of a crime. 42 U. S. C. § 1997e(a)(1) (1976 ed., Supp. IV).[10] Section 1997e(b)(1) instructs the Attorney General to "promulgate minimum standards for the development and implementation of a plain, speedy, and effective system" of administrative remedies, and § 1997e(b)(2) specifies certain minimum standards that must be included.[11] A court may require exhaustion of administrative remedies only if "the Attorney General has certified or the court has determined that such administrative

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[10] Representative Kastenmeier explains why juveniles were not included in § 1997e:

"I think very candidly we should admit that the first reluctance to resort to this mechanism embodied in [§ 1997e] was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983; because it does deflect 1983 petitions back into—temporarily in any event—back into the State system. Therefore, to the extent that it is even so viewed, notwithstanding the limited form of [§ 1997e], that it should also extend to juveniles was rejected." 1979 Hearings 26.

[11] Section 1997e(b)(2) states:

"The minimum standards shall provide—

"(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

"(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

"(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

"(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

"(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution."

remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b)." § 1997e(a)(2). Before exhaustion may be required, the court must further conclude that it "would be appropriate and in the interests of justice." § 1997e(a)(1).[12] Finally, in those § 1983 actions meeting all the statutory requirements for exhaustion, the district court may not dismiss the case, but may only "continue such case for a period of not to exceed ninety days in order to require exhaustion." *Ibid.* This detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases.

Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms. See, *e. g.*, Conf. Rep. 9; H. R. Rep. No. 96–80, p. 4 (1979); 1979 Hearings 4 (remarks of Rep. Railsback); 124 Cong. Rec. 11976 (1978) (remarks of Rep. Railsback); 125 Cong. Rec. 12492 (1979) (remarks of Rep. Drinan); 126 Cong. Rec. 10780 (1980) (remarks of Rep. Kastenmeier). To further this purpose, Congress provided for the deferral of the exercise of federal jurisdiction over certain § 1983 claims only on the condition that the state prisons develop adequate procedures. This purpose would be frustrated by judicial discretion to impose exhaustion generally: the States would have no incentive to adopt grievance

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[12] The Committee Reports state that Congress did not intend that every § 1983 action brought by an adult prisoner in institutions with appropriate grievance procedures be delayed pending exhaustion:

"It is the intent of the Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to [§ 1983] raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system, including cases where imminent danger to life is alleged. Allegations unrelated to conditions of confinement, such as those which center on events outside of the institution, would not appropriately be continued for resolution by the grievance resolution system." Conf. Rep. 15.

See also H. R. Rep. No. 96–80, p. 25 (1979); S. Rep. No. 96–416, p. 34 (1979).

procedures capable of certification, because prisoner § 1983 cases could be diverted to state administrative remedies in any event.

In sum, the exhaustion provisions of the Act make sense, and are not superfluous, only if exhaustion could not be required before its enactment and if Congress intended to carve out a narrow exception to this no-exhaustion rule. The legislative history of § 1997e demonstrates that Congress has taken the approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983. It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983.

C

Respondent and the Court of Appeals argue that exhaustion of administrative remedies should be required because it would further various policies. They argue that an exhaustion requirement would lessen the perceived burden that § 1983 actions impose on federal courts;[13] would further the goal of comity and improve federal-state relations by postponing federal-court review until after the state administrative agency had passed on the issue;[14] and would enable the agency, which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision.

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[13] Of course, this burden alone is not sufficient to justify a judicial decision to alter congressionally imposed jurisdiction. See *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 344 (1976); *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145, 150–151 (1965). In any event, it is by no means clear that judicial discretion to impose an exhaustion requirement in § 1983 actions would lessen the caseload of the federal courts, at least in the short run. See *infra*, at 513–514, and n. 18.

[14] The application of these federalism principles to actions brought pursuant to § 1983 has prompted criticism by several commentators. See, *e. g.*, Koury, Section 1983 and Civil Comity: Two for the Federalism Seesaw, 25 Loyola L. Rev. 659 (1979); Note, 39 N. Y. U. L. Rev. 838 (1964).

As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent. See *supra*, at 501–502, and n. 4. Furthermore, as the debates over incorporating the exhaustion requirement in § 1997e demonstrate, the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them.[15] The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable. Cf. *Diamond* v. *Chakrabarty*, 447 U. S. 303, 317 (1980); *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145, 150, 153 (1965).

Beyond the policy issues that must be resolved in deciding *whether* to require exhaustion, there are equally difficult questions concerning the design and scope of an exhaustion requirement. These questions include how to define those categories of § 1983 claims in which exhaustion might be de-

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[15] For example, there is serious disagreement over whether judicial or administrative procedures offer § 1983 plaintiffs the swiftest, least costly, and most reliable remedy. See, *e. g.*, 1977 Hearings 263–264; *id.*, at 232–233; Note, 68 Colum. L. Rev. 1201, 1207 (1968). Similarly, there is debate over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their areas of expertise, and over whether the symbolic and institutional function of federal courts in defining, legitimizing, and enforcing constitutional claims outweighs the educational function that state and local agencies can serve. See, *e. g.*, Whitman, Constitutional Torts, 79 Mich. L. Rev. 5, 23 (1980); Note, 68 Colum. L. Rev., *supra*, at 1208. Finally, it is uncertain whether the present "free market" system, under which litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective, is more likely to induce the creation of adequate remedies than a *McKart*-type standard under which plaintiffs have no initial choice. See, *e. g.*, Note, 8 Ind. L. Rev. 565 (1975). Cf. 1977 Hearings 21, 34, 51; Hearings on S. 1393 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., 442 (1977).

sirable; how to unify and centralize the standards for judging the kinds of administrative procedures that should be exhausted;[16] what tolling requirements and time limitations should be adopted;[17] what is the res judicata and collateral estoppel effect of particular administrative determinations; what consequences should attach to the failure to comply with procedural requirements of administrative proceedings; and whether federal courts could grant necessary interim injunctive relief and hold the action pending exhaustion, or proceed to judgment without requiring exhaustion even though exhaustion might otherwise be required, where the relevant administrative agency is either powerless or not inclined to grant such interim relief. These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.[18]

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[16] Section 1997e resolved this problem by directing the Attorney General to promulgate minimum standards and to establish a procedure by which prison administrative remedies could be reviewed and certified. §§ 1997e(b) and (c). If a procedure has not been certified, the court is directed to compare the procedure with the Attorney General's standards and to continue the case pending exhaustion only if the procedure is in substantial compliance with the standards of the Attorney General. § 1997e(a)(2).

[17] Unless the doctrine that statutes of limitations are not tolled pending exhaustion were overruled, see *Board of Regents* v. *Tomanio*, 446 U. S. 478 (1980), a judicially imposed exhaustion requirement might result in the effective repeal of § 1983. Congress avoided this problem in § 1997e by directing the court to merely continue the case for a period not to exceed 90 days.

[18] The initial bill proposing to include an exhaustion requirement in § 1997e provided:

"Relief shall not be granted by a district court in an action brought pursuant to [§ 1983] by an individual involuntarily confined in any State institution . . . , unless it appears that the individual has exhausted such plain,

The very variety of claims, claimants, and state agencies involved in § 1983 cases argues for congressional consideration of the myriad of policy considerations, and may explain why Congress, in deciding whether to require exhaustion in certain § 1983 actions brought by adult prisoners, carved out such a narrow, detailed exception to the no-exhaustion rule. After full debate and consideration of the various policy arguments, Congress adopted § 1997e, taking the largest class of § 1983 actions and constructing an exhaustion requirement that differs substantially from the *McKart*-type standard urged by respondent and adopted by the Court of Appeals. See n. 18, *supra*. It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims.[19]

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speedy, and efficient State administrative remedy as is available." H. R. 5791, 95th Cong., 1st Sess., § 4 (1977).

Congress declined to adopt this *McKart*-type standard after witnesses testified that this procedure would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts, that state procedures are often not effective and take too much time, and that the court would have to judge a myriad of state procedures without much guidance. See, *e. g.*, 1977 Hearings 34–35, 51, 164–165, 169–170, 263–264, 323; 1979 Hearings 48–49.

[19] The question was posed from the bench at oral argument whether the Eleventh Amendment might bar this suit on the ground that the Board of Regents is an arm of the State for purposes of the Eleventh Amendment. Tr. of Oral Arg. 20. Cf. *Alabama* v. *Pugh*, 438 U. S. 781 (1978). Compare *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911), with *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981). The District Court dismissed this action on the pleadings, and no Eleventh Amendment issue had been raised. The Board of Regents first raised this issue in its brief to the original panel on appeal, but did not argue it in its brief on rehearing en banc. Neither the original panel nor the en banc court addressed this issue. Although the State mentioned a possible Eleventh Amendment defense in its response in opposition to the

IV

Based on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required. The decision of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring.

As discussed in JUSTICE POWELL's dissenting opinion, as well as in the opinion of the court below, considerations of sound policy suggest that a § 1983 plaintiff should be required to exhaust adequate state administrative remedies before filing his complaint. At the very least, prior state adminis-

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petition for certiorari, it did not brief the issue or press it at oral argument. Indeed, counsel for respondent urged that we affirm the Court of Appeals solely on its exhaustion holding. Tr. of Oral Arg. 24, 27.

We have noted that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised by the State for the first time on appeal. *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974). However, because of the importance of state law in analyzing Eleventh Amendment questions and because the State may, under certain circumstances, waive this defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion. Cf. *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 279 (1977). Where, as here, the Board of Regents expressly requested that we address the exhaustion question and not pass on its potential Eleventh Amendment immunity, and, as a consequence, the parties have not briefed the issue, we deem it appropriate to address the issue that was raised and decided below and vigorously pressed in this Court. Nothing in this opinion precludes the Board of Regents from raising its Eleventh Amendment claim on remand. The District Court is in the best position to address in the first instance the competing questions of fact and state law necessary to resolve the Eleventh Amendment issue, and at this stage it has the discretion to permit amendments to the pleadings that might cure any potential Eleventh Amendment problems.

trative proceedings would resolve many claims, thereby decreasing the number of § 1983 actions filed in the federal courts, which are now straining under excessive caseloads. However, for the reasons set forth in the Court's opinion, this Court already has ruled that, in the absence of additional congressional legislation, exhaustion of administrative remedies is not required in § 1983 actions. Perhaps Congress' enactment of the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV), which creates a limited exhaustion requirement for prisoners bringing § 1983 suits, will prompt it to reconsider the possibility of requiring exhaustion in the remainder of § 1983 cases. Reluctantly, I concur.

JUSTICE WHITE, concurring in part.

I fully agree with the Court that our frequent and unequivocal statements on exhaustion cannot be explained or distinguished away as the Fifth Circuit attempted to do. For nearly 20 years and on at least 10 occasions, this Court has clearly held that no exhaustion of administrative remedies is required in a § 1983 suit. *Ante*, at 500. Whether or not this initially was a wise choice, these decisions are *stare decisis*, and in a statutory case, a particularly strong showing is required that we have misread the relevant statute and its history. I have no difficulty in concluding that on the issue of exhaustion, unlike the question of municipal immunity faced in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court has not previously misapprehended the meaning of the 1871 debates in rejecting an exhaustion rule in *McNeese* v. *Board of Education*, 373 U. S. 668, 671–673 (1963), and adhering to that position ever since. Our precedents and the legislative history are sufficient to support reversal, and I accordingly join the judgment and all but Part III–B of the opinion of the Court.

In Part III–B, the Court unnecessarily and unwisely ventures further to find support where none may be had. The wisdom of a general no-exhaustion rule in § 1983 suits was

not at issue when Congress considered and passed the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). As JUSTICE POWELL persuasively points out in his dissenting opinion, and as reflected in the title of the Act, congressional attention was narrowly focused on procedures concerning the legal rights of prisoners and other institutionalized persons. Unsurprisingly, the legislation which emerged addressed only the specific problem under investigation; it indicates neither approval of a no-exhaustion rule nor an intent to preclude us from reconsidering the issue.

As the Court acknowledges, *ante*, at 513, the policy arguments cut in both directions. The Court concludes that "the very difficulty of these policy considerations, and Congress' superior institutional competence . . . suggest that legislative not judicial decisions are preferable." To be sure, exhaustion is a statutory issue and the dispositive word on the matter belongs to Congress. It does not follow, however, that, were the issue not foreclosed by earlier decisions, we would be institutionally incompetent to formulate an exhaustion rule. The lack of an exhaustion requirement in § 1983 actions is itself an exception to the general rule, judicially formulated, that exhaustion of administrative remedies is required in a civil action. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *McKart* v. *United States*, 395 U. S. 185 (1969). Unlike other statutory questions, exhaustion is "a rule of judicial administration," *Myers* v. *Bethlehem Shipping Corp.*, *supra*, at 50, and unless Congress directs otherwise, rightfully subject to crafting by judges. Our resolution of this case as governed by *stare decisis*, reinforced by the legislative history of § 1983, should not be taken as undercutting the general exhaustion principle of long standing. The result today is also fully consistent with our decisions that a defendant in a civil or administrative enforcement proceeding may not enjoin and sidetrack that proceeding by resorting to a § 1983 action in federal court, *Huffman*

v. *Pursue, Ltd.*, 420 U. S. 592 (1975); *Juidice* v. *Vail*, 430 U. S. 327 (1977); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Moore* v. *Sims*, 442 U. S. 415 (1979), and that a federal action should be stayed pending determination of state-law issues central to the constitutional dispute. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). On this understanding, I join all but Part III–B of the opinion of the Court.*

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins as to Part II, dissenting.

The Court holds that the limitations on federal judicial power embodied in the Eleventh Amendment and in the doctrine of sovereign immunity are not jurisdictional. I con-

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*In my view, this case does not present a serious Eleventh Amendment issue. The Florida statute authorizing suits against the Board of Regents, Fla. Stat. § 240.205 (1981), is clear on its face. I see no reason to read a broad waiver to sue and be sued in "all courts of law and equity" as meaning all but federal courts. Nor am I aware of anything in Florida law that suggests a more limited meaning was intended than indicated by the unequivocal terms of the statute. Certainly, none of our cases have gone so far as to hold that federal courts must be expressly mentioned for an effective Eleventh Amendment waiver.

The statutes at issue in cases recited by JUSTICE POWELL, *post*, at 522–523, n. 5, presented more equivocal embodiments of state intent. For example, in *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981) *(per curiam)*, the authorization to sue and be sued was limited to contract actions and, unlike the instant provision, did not extend to "all courts of law and equity." The same is true of the interstate compact involved in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959). The decision in *Kennecott Copper Corp.* v. *Tax Comm'n*, 327 U. S. 573 (1946), which involved a statute providing for suit in "any court of competent jurisdiction," turned on the incongruity of federal courts' interpreting state tax laws and the fact that "Utah employs explicit language to indicate, in other litigation, its consent to suits in federal courts." *Id.*, at 579.

Thus, while I do not object to the Court's leaving the Eleventh Amendment issue for further consideration by the lower courts—at least where, as here, there is no logical priority in resolving Eleventh Amendment immunity before exhaustion—I find the issue sufficiently clear to be answered here and now. The statute means what it says.

sider this holding to be a serious departure from established constitutional doctrine.

I dissent also from the Court's rejection of the rule of "flexible" exhaustion of state administrative remedies developed and stated persuasively by the Court of Appeals for the Fifth Circuit, sitting en banc. In disagreeing with the 17 judges of the Court of Appeals who adopted the flexible exhaustion principle, this Court places mistaken reliance on the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). I disagree with both portions of the Court's holding and therefore dissent.

I. The Eleventh Amendment.[1]

A

In this "reverse discrimination" action, petitioner, an employee of the Florida International University, brought suit under 42 U. S. C. § 1983 against the Board of Regents of the State of Florida.[2] She did not name the individual Regents as defendants. She sued for $500,000 in damages, and for injunctive and other equitable relief. See *ante*, at 498–499, n. 2. The Board filed a motion to dismiss, arguing that petitioner's suit was premature in light of her failure to exhaust available administrative remedies. The District Court agreed and granted the motion to dismiss.

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[1] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[2] As the Court notes, see *ante*, at 498, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner also claimed that she had been discriminated against on the basis of her sex.

On petitioner's appeal, the Board added the bar of the Eleventh Amendment to its defense.[3] It argued that as an instrumentality of the State, the Board could not be subjected to suit in federal court absent a waiver of immunity.[4]

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[3] The Court repeatedly has held that the defense of the Eleventh Amendment may be raised for the first time on appeal. See *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974) ("Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court").

The Board's brief on appeal was divided into three parts. Part III was devoted to the argument that "the Eleventh Amendment precludes subject matter jurisdiction over plaintiff's complaint." Brief for Defendant-Appellee in No. 79–2965 (CA5), p. 17. A lengthy statutory addendum was attached in support of the arguments advanced in this section of the brief. After the case was scheduled for rehearing en banc, the parties filed short—*i. e.*, 4- and 10-page—supplemental briefs to be considered in addition to the main briefs already submitted to the Court of Appeals. The supplemental briefs did not add to the discussion of the Eleventh Amendment issue. But the question was placed before the Court of Appeals en banc, as it had been placed before the panel, through the thorough discussion in the main briefs.

This Court's explanation for not addressing the Eleventh Amendment issue is that it was not considered below. See *ante*, at 515–516, n. 19. But contrary to the implication in the Court's explanation, the issue—as shown here—was urged by the Board and argued here.

[4] The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. § 240.2011 (1981). The Board consists of the Commissioner of Education and 12 citizens appointed by the Governor. § 240.207. The Board has general supervisory authority over the State University System. § 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. *Ibid.*

The Board is an agency of the State of Florida. § 216.011. See *Relyea* v. *State*, 385 So. 2d 1378 (Fla. App. 1980). It may claim the defense of sovereign immunity in suits under state law. See *ibid.*

Numerous Courts of Appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Elev-

And it asserted that there had been no waiver. Although the Board of Regents was created as a body corporate with power "to sue and be sued . . . to plead and be impleaded in all courts of law and equity," Fla. Stat. § 240.205(4)(1) (1981), it is well established that language such as this does not operate to waive the defense of the Eleventh Amendment.[5] In

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enth Amendment. See, *e. g.*, *Rutledge* v. *Arizona Board of Regents*, 660 F. 2d 1345, 1349 (CA9 1981); *Brennan* v. *University of Kansas*, 451 F. 2d 1287 (CA10 1971); *Ronwin* v. *Shapiro*, 657 F. 2d 1071 (CA9 1981).

[5] See, *e. g.*, *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 150 (1981); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 276–277 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred. . . . And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts"); *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946) (language in state statute providing for suit in "any court of competent jurisdiction" will not be understood as a waiver of the Eleventh Amendment); *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459 (1945) (same); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47, 54 (1944) ("a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found"); *Jagnandan* v. *Giles*, 538 F. 2d 1166, 1177 (CA5 1976). Cf. *Edelman* v. *Jordan*, *supra*, at 673 ("In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction' "). It is difficult to reconcile the Court's consistent requirement of an express waiver with the approach advocated by JUSTICE WHITE. See *ante*, at 519, n.

At oral argument here counsel for respondent stated that the Florida Legislature had not waived the Eleventh Amendment and had waived the defense of sovereign immunity "only in selected tort cases." Tr. of Oral Arg. 26. See *Bragg* v. *Board of Public Instruction*, 36 So. 2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort"); *Relyea* v. *State*, *supra* (Board of Regents retains defense of sovereign immunity); Fla. Stat. § 111.071(1)(b)(4) (1981) (provision for payment by the State of civil rights judgments against state officers—including judgments under 42 U. S. C. § 1983 (1976 ed., Supp. IV)—does not waive sovereign immunity "or any other defense or immunity" to such lawsuits). Cf. *Long* v. *Richardson*, 525 F. 2d 74, 79 (CA6 1975)

reply, petitioner argued that whether or not the statute creating the Board amounted to a waiver—and petitioner believed that it did—the Eleventh Amendment simply was irrelevant to the equitable claims she had lodged against the State. See Reply Brief for Petitioner 3–4.

Neither the Court of Appeals panel nor the Court of Appeals en banc addressed the Board's Eleventh Amendment defense. They directed their attention solely to the question of exhaustion of administrative remedies. The panel held that there was no exhaustion requirement in § 1983 suits and remanded to the District Court for consideration of the Board's Eleventh Amendment argument. *Patsy* v. *Florida International University*, 612 F. 2d 946 (1980). The Court of Appeals, sitting en banc, reversed, holding that § 1983 plaintiffs must exhaust available and reasonable administrative remedies. *Patsy* v. *Florida International University*, 634 F. 2d 900 (1981). Again the court did not consider the Board's Eleventh Amendment defense.

The Eleventh Amendment question was raised before this Court, at the first opportunity after the Court of Appeals' decision, in the Board's response to the petition for writ of certiorari. The Board argued, as it had on appeal, that it was an arm of the State and that it had not waived its immunity from suit in federal court.[6] Again petitioner answered that

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(state university's immunity from suit under state law disposes of Eleventh Amendment question).

[6] See Brief in Opposition 23 ("Should this Court grant the writ, the Board respectfully submits that review should be limited to the jurisdictional issues discussed below and this Court should vacate the Fifth Circuit's decision with instructions to dismiss [petitioner's] suit for lack of jurisdiction").

The Court, *ante*, at 516, n. 19, attaches importance to the statement at oral argument by counsel for the Board that the Board wanted the exhaustion issue decided. This must be viewed, however, in light of the Board's unsuccessful attempt to have this Court *first* decide the Eleventh Amendment issue. Moreover, a party's request—short of a binding waiver—cannot relieve this Court of its duty to resolve a jurisdictional question.

at most the Eleventh Amendment defense would bar her claim for damages. And, even as to this claim, petitioner now argued that the Amendment would not bar damages if the Board could meet the claim out of its "own funds"—*e. g.*, from gifts and bequests—rather than from the state treasury. These arguments were repeated at oral argument.[7]

B

The Court views the jurisdictional question presented by the Eleventh Amendment as if it were of little or no importance. Its entire discussion of the question is relegated to a conclusory note at the end of the opinion. See *ante*, at 515–516, n. 19. The Court concedes that the Amendment and the bar of sovereign immunity are "jurisdictional," but only in the sense that the State may raise the claim at any point in the proceedings. The statement is then made that the Amendment is not jurisdictional "in the sense that it must be raised and decided by this Court on its own motion." *Ibid.*[8] The Court cites to no authority in support of this statement,[9] and

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[7] Tr. of Oral Arg. 25–28, 40–41. At oral argument, the Board's counsel stated that the Eleventh Amendment question had not been addressed in its main briefs to this Court "because of the grant of certiorari." *Id.*, at 27.

[8] In view of the Board's repeated efforts to raise the Eleventh Amendment question, and its specific request that this Court vacate the decision of the Court of Appeals for lack of jurisdiction, see n. 6, *supra*, it is hardly correct to say that the Court must now raise the question of jurisdiction on its own motion. Cf. *Sosna* v. *Iowa*, 419 U. S. 393, 396, n. 2 (1975). In any event, "we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 278 (1977).

[9] The Court cites, with a "compare" signal, to *Mt. Healthy City Bd. of Ed.* v. *Doyle*, *supra*, at 279. The *Mt. Healthy* Court in no way suggested that the Eleventh Amendment and the principle of sovereign immunity embodied in Art. III were less than jurisdictional. Indeed, the Court found it necessary to resolve the Eleventh Amendment question in that case prior to reaching the merits.

On the contrary, the Court consistently has viewed the Amendment as jurisdictional. In *Sosna* v. *Iowa*, *supra*, at 396, n. 2, the Court raised the

it would be surprising if any existed. The reason that the Eleventh Amendment question may be raised at any point in the proceedings is precisely because it places limits on the basic authority of federal courts to *entertain* suits against a State. The history and text of the Eleventh Amendment, the principle of sovereign immunity exemplified by it, and the well-established precedents of this Court make clear that today's decision misconceives our jurisdiction and the purpose of this Amendment.

A basic principle of our constitutional system is that the federal courts are courts of limited jurisdiction. Their authority extends only to those matters within the judicial power of the United States as defined by the Constitution. In language that could not be clearer, the Eleventh Amendment removes from the judicial power, as set forth in Art. III, suits "commenced or prosecuted against one of the United States." When an Amendment to the Constitution states in plain language that "the judicial power of the United States shall not be construed to extend" to suits against a State, from what source does the Court today derive its jurisdiction? The Court's "back-of-the-hand" treatment of this threshold issue offers no answer. Questions of jurisdiction and of the legitimate exercise of power are fundamental in our federal constitutional system.[10]

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question of the Eleventh Amendment even though the State had asserted the bar of the Amendment only in its answer to the complaint and had thereafter abandoned this defense. Unlike the Board of Regents in this case, the State of Iowa had not advanced the defense in this Court. Even so, the *Sosna* Court raised and addressed the question. These precedents are ignored by the Court today.

[10] "Because of their unusual nature, and because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court." C. Wright & A. Miller, Federal Practice and Procedure § 3522, p. 45 (1975).

C

The Eleventh Amendment was adopted as a response to this Court's assumption of original jurisdiction in a suit brought against the State of Georgia. *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). Relying upon express language in Art. III extending the judicial power to controversies between a State and citizens of another State, the Court found that it had jurisdiction. The decision is said to have created a shock throughout the country. See *Hans* v. *Louisiana*, 134 U. S. 1, 11 (1890). The Amendment was adopted shortly thereafter, and the Court understood that it had been overruled: "'the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state.'" *Ibid.*

In light of the history and wording of the Amendment, the Court has viewed the Amendment as placing explicit limits on the judicial power as defined by Art. III. See *Nevada* v. *Hall*, 440 U. S. 410, 421 (1979). But more than that, and beyond the express provisions of the Amendment, the Court has recognized that the Amendment stands for a principle of sovereign immunity by which the grant of authority in Art. III itself must be measured.[11] Thus, in *Hans* v. *Louisiana*, *supra*, the Court held that the federal judicial power did not extend to a suit against a nonconsenting State by one of its own citizens. Although the Eleventh Amendment by its terms does not apply to such suits, the Court found that

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[11] "[T]he Eleventh Amendment was introduced to clarify the intent of the Framers concerning the reach of the federal judicial power. . . . The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding . . . . Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally . . . ." *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 291–292 (1973) (MARSHALL, J., concurring in result).

the language of the Amendment was but an illustration of a larger principle: Federal jurisdiction over suits against a State, absent consent, "was not contemplated by the Constitution when establishing the judicial power of the United States." *Id.*, at 15.[12] See *Smith* v. *Reeves*, 178 U. S. 436 (1900).

Similarly, in *Ex parte New York*, 256 U. S. 490 (1921), the Court found that despite the Eleventh Amendment's specific reference to suits in "law or equity," the principle of sovereign immunity exemplified by the Amendment would not permit the extension of federal admiralty jurisdiction over a nonconsenting State. The Court applied the same approach in *Monaco* v. *Mississippi*, 292 U. S. 313 (1934), in which the Court refused to take jurisdiction over a suit against a State by a foreign state. On its face, Art. III provided jurisdiction over suits "between a State . . . and foreign States." Nor did the Eleventh Amendment specifically exempt the States from suit by a foreign state. Nevertheless, the Court concluded that the judicial power of the United States, granted by Art. III, did not extend so far: "We think that Madison correctly interpreted Clause one of §2 of Article III of the Constitution as making provision for jurisdiction of a suit against a State by a foreign State in the event of the State's consent but not otherwise." *Id.*, at 330.

In this case a resident of the State of Florida has sued a Board exercising a major function of the State's sovereign authority. As prior decisions have held, whether this case is viewed only under the Eleventh Amendment—with its

[12] The *Hans* Court quoted at some length from the constitutional debates concerning the scope of Art. III. In the eighty-first number of the Federalist, for example, Hamilton sought to dispel the suggestion that Art. III extended federal jurisdiction over suits brought against one of the States: "'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.'" As quoted in 134 U. S., at 13 (emphasis in original).

explicit limitation on federal jurisdiction—or under Art. III, the analysis must be the same. Absent consent, the "judicial power of the United States," as defined by Art. III and the Eleventh Amendment, simply does not extend to suits against one of the States by a citizen of that State:[13]

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given:* not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." *Ex parte New York*, *supra*, at 497 (emphasis added).

The Court does not distinguish these unquestioned precedents. They are wholly and inexplicably ignored. Quite

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[13] Unlike other limitations on federal jurisdiction, the limitation imposed by the Eleventh Amendment and the doctrine of sovereign immunity may be waived by consent unequivocally expressed. This was the understanding of the doctrine at the time the Constitution was adopted, see n. 11, *supra*, and the Court has interpreted the "judicial power of the United States" as used in the Eleventh Amendment and Art. III accordingly. But the fact that the State or the United States may consent to federal jurisdiction, does not render the Eleventh Amendment or the doctrine of sovereign immunity embodied in Art. III "quasi" jurisdictional. Quite simply, where there has not been consent, there is no jurisdiction. See *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit"); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void").

simply the Court today disregards controlling decisions and the explicit limitation on federal-court jurisdiction in Art. III and the Eleventh Amendment. The Court does recognize that the Eleventh Amendment is jurisdictional "in the sense" that the State may raise the bar of the Amendment for the first time on appeal. Yet the Court misses the point of this statement. The reason that the bar of the Amendment may be raised at any time—as the Court previously has explained—is precisely because it *is* jurisdictional:

> "The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued . . . in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, 467 (1945).[14]

Despite these precedents, and apparently because of an unexplained anxiety to reach the exhaustion issue decided by the Court of Appeals, this Court remands the issue of *its own* jurisdiction to the courts below.

D

I believe that the Eleventh Amendment question must be addressed and that the answer could hardly be clearer. This is an action under § 1983.[15] Petitioner seeks relief from the

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[14] See *Edelman* v. *Jordan*, 415 U. S., at 678; *Sosna* v. *Iowa*, 419 U. S., at 396, n. 2; *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S., at 278. The Court has consistently viewed the Eleventh Amendment question as jurisdictional. See *Great Northern Life Insurance Co.* v. *Read*, 322 U. S., at 51 ("A state's *freedom from litigation* was established as a constitutional right through the Eleventh Amendment") (emphasis added); *Monaco* v. *Mississippi*, 292 U. S. 313, 320 (1934) (Question is "whether this Court has jurisdiction *to entertain* a suit brought by a foreign State against a State without her consent") (emphasis added).

[15] The States consented to a diminution of their sovereignty by ratifying the Fourteenth Amendment. In its exercise of the powers granted to it

Board of Regents of the State of Florida, a major instrumentality or agency of the State. Petitioner's argument that the statute incorporating the Board should be understood to waive the Eleventh Amendment is foreclosed by numerous decisions of this Court and is unsupported by State law. See, *e. g.*, *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981); n. 5, *supra*. Similarly, petitioner's suggestion that the Eleventh Amendment does not bar her equitable claims against the Board must be rejected. The Amendment applies to suits "in law *or* equity." All suits against an unconsenting State—whether for damages or injunctive relief—are barred. See *Cory* v. *White*, *ante*, p. 85.[16] Finally, the rule in *Ex parte Young*, 209 U. S. 123 (1908), permitting a federal court to order state *officials* to obey federal law in the future, is simply irrelevant to this case.[17] Petitioner did not sue the members of the Board of

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by § 5 of the Fourteenth Amendment, Congress may lift the bar of sovereign immunity. See *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). Thus, if petitioner had brought this suit under Title VII of the Civil Rights Act of 1964, there would have been no jurisdictional problem. But petitioner did not do so, and the Court has held that Congress has not removed the bar of sovereign immunity in § 1983 actions. See *Quern* v. *Jordan*, 440 U. S. 332 (1979).

[16] "It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. . . . [T]he Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity." *Cory* v. *White*, *ante*, at 90–91.

[17] Under the theory of *Ex parte Young* the Eleventh Amendment does not bar suits against state officers because when a state officer "comes into conflict with the superior authority of [the] Constitution, . . . he is . . . stripped of his official or representative character." 209 U. S., at 159–160. The rationale of that decision has no application to suits against the State or its agencies. Although an individual official may be viewed as acting on his own and without state authority when acting against federal law, the State—or an agency of the State—cannot act other than in its official state capacity. Similarly, an action for damages against the State, or an arm of the State, seeks damages that must be paid from the State's own coffers—whether the damages come directly from the State's general fund

Regents. She sued the Board itself, an arm of the State of Florida.

In my view, the Eleventh Amendment—and the principle of sovereign immunity exemplified by the Amendment and embodied in Art. III—clearly bar the suit in this case. The Court's refusal to address the question of its own jurisdiction violates well-established precedents of this Court as well as the basic premise that federal courts are courts of limited jurisdiction. Even had the parties neglected to address the Eleventh Amendment question, it would have been our responsibility to consider it on our own motion. In fact, the question has been fully briefed to the Court of Appeals and

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or from some other state fund. See *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946) (segregated funds of the State Tax Commission are state moneys subject to the Eleventh Amendment).

Moreover, the fact that the Board is a corporate entity under state law does not permit application of the rule in *Ex parte Young* to the Board itself—as if the Board were an official. This Court repeatedly has held the Eleventh Amendment to bar suit against such state corporate agencies. See *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981); *Great Northern Insurance Co.* v. *Read*, *supra*; *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459 (1945); *Kennecott Copper Corp.* v. *State Tax Comm'n*, *supra*.

Hopkins v. *Clemson Agricultural College*, 221 U. S. 636 (1911), is not to the contrary. In that case suit was brought against a state college *in state court* to recover damages caused by the college's construction of a dyke. Although the Court discussed the Eleventh Amendment in some detail, there was simply no Eleventh Amendment question in that case. It was clear before *Hopkins* that the Eleventh Amendment did not apply to bar review in this Court of any federal question presented in a suit against a State in *state* court. See *Chandler* v. *Dix*, 194 U. S. 590, 592 (1904). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978). Moreover, the *Hopkins* Court did not consider the college's activities in that case to be governmental. 221 U. S., at 647. In short, no Eleventh Amendment question was presented to the Court. The opinion in *Hopkins* has never been cited by this Court for the proposition that the Eleventh Amendment is no bar to suit against a state corporate agency in federal court. See *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, *supra*; *Alabama* v. *Pugh*, 438 U. S. 781 (1978); *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964).

raised in this Court. See n. 8, *supra*. Cf. *Sosna* v. *Iowa*, 419 U. S. 393, 396, n. 2 (1975). I would dismiss this suit and vacate the decision of the Court of Appeals for lack of jurisdiction.

II. Exhaustion of Remedies.

In view of my belief that this case should be dismissed on jurisdictional grounds, I address the exhaustion question only briefly. Seventeen judges joined in the Court of Appeals' persuasive opinion adopting a rule of "flexible" exhaustion of administrative remedies in § 1983 suits. Other Courts of Appeals have adopted a similar rule. See, *e. g.*, *Eisen* v. *Eastman*, 421 F. 2d 560 (CA2 1969); *Secret* v. *Brierton*, 584 F. 2d 823 (CA7 1978). The opinion for the en banc court carefully reviewed the exhaustion doctrine in general and as applied to § 1983 actions. It found that the prior decisions of this Court did not clearly decide the question.[18] See *Barry* v. *Barchi*, 443 U. S. 55, 63, n. 10 (1979); *Gibson* v. *Berryhill*, 411 U. S. 564, 575, n. 14 (1973). And it concluded that the exhaustion of adequate and appropriate state administrative remedies would promote the achievement of the rights protected by § 1983.

I agree with the Court of Appeals' opinion. The requirement that a § 1983 plaintiff exhaust adequate state administrative remedies was the accepted rule of law until quite recently. See *Eisen* v. *Eastman*, *supra*, at 567. The rule rests on sound considerations. It does not defeat federal-court jurisdiction, it merely defers it.[19] It permits the States

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[18] "[I]n all the cases in which the Supreme Court has articulated its no-exhaustion rule, the state administrative remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." Developments in the Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1274 (1977).

[19] Cf. *Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U. S. 100, 136 (1981) (BRENNAN, J., concurring in judgment) (exhaustion requirement in § 1983 cases can be justified by "a somewhat lesser showing . . . where . . . we are concerned not with the displacement of the § 1983 rem-

to correct violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to review state action or supersede state proceedings. See *Younger* v. *Harris*, 401 U. S. 37 (1971).

Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the rule conserves and supplements scarce judicial resources. In 1961, the year that *Monroe* v. *Pape*, 365 U. S. 167, was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U. S. Courts, 238 (1961). In 1981, over 30,000 such suits were commenced.[20] Annual Report of the Director of the Administrative Office of the U. S. Courts 63, 68 (1981). The result of this unprecedented increase in civil rights litigation is a heavy burden on the federal courts to the detriment of all federal-court litigants, including others who assert that their constitutional rights have been infringed.

The Court argues that past decisions of the Court categorically hold that there is no exhaustion requirement in § 1983 suits. But as the Court of Appeals demonstrates, and as the Court recognizes, many of these decisions can be explained as applications of traditional exceptions to the exhaustion requirement. See *McNeese* v. *Board of Education*, 373 U. S. 668 (1963). Other decisions speak to the question in an offhand and conclusory fashion without full briefing and argument. See *Wilwording* v. *Swenson*, 404 U. S. 249, 251 (1971) (unargued *per curiam*); *Damico* v. *California*, 389 U. S. 416 (1967) (unargued *per curiam*). Moreover, a cate-

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edy, but with the deferral of federal court consideration pending exhaustion of the state *administrative* process").

[20] Of the approximately 30,000 civil rights suits filed in fiscal year 1981, 15,639 were filed by state prisoners under § 1983. The remainder involved a variety of civil rights suits. Annual Report of the Director of the Administrative Office of the U. S. Courts 63, 68 (1981). See *Parratt* v. *Taylor*, 451 U. S. 527, 554, n. 13 (1981) (POWELL, J., concurring in result).

gorical no-exhaustion rule would seem inconsistent with the decision in *Younger* v. *Harris*, *supra*, prescribing abstention when state criminal proceedings are pending. At least where administrative proceedings are pending, *Younger* would seem to suggest the appropriateness of exhaustion. Cf. *Gibson* v. *Berryhill*, *supra*, at 574–575. Yet the Court today adopts a flat rule without exception.

The Court seeks to support its no-exhaustion rule with indications of congressional intent. Finding nothing directly on point in the history of the Civil Rights Act itself, the Court places primary reliance on the recent Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). This legislation was designed to authorize the Attorney General to initiate civil rights actions on behalf of institutionalized persons. § 1997a. The Act also placed certain limits on the existing authority of the Attorney General to intervene in suits begun by institutionalized persons. See § 1997c. In addition, in § 1997e, the Act sets forth an exhaustion requirement but only for § 1983 claims brought by prisoners.

On the basis of the exhaustion provision in § 1997e, and remarks primarily by Representative Kastenmeier, the Court contends that Congress has endorsed a *general* no-exhaustion rule. The irony in this reasoning should be obvious. A principal concern that prompted the Department of Justice to support, and the Congress to adopt, § 1997e was the vast increase in § 1983 suits brought by state prisoners in federal courts. There has been a year-by-year increase in these suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1980 was some 26%, resulting in a total of 15,639 such suits filed in 1981 as compared with 12,397 in 1980. The 1981 total constituted over 8.6% of the total federal district court civil docket. Although most of these cases present frivolous claims, many are litigated through the courts of appeals to this Court. The burden on the system fairly can be described as enormous with few, if any, benefits that would not

be available in meritorious cases if exhaustion of appropriate state administrative remedies were required prior to any federal-court litigation. It was primarily this problem that prompted enactment of § 1997e.[21]

Moreover, it is clear from the legislative history that Congress simply was not addressing the exhaustion problem in any general fashion. The concern focused on the problem of prisoner petitions. The new Act had a dual purpose in this respect. In addition to requiring prior exhaustion of adequate state remedies, Congress wished to authorize the Attorney General to act when necessary to protect the constitutional rights of prisoners, but at the same time minimize the need for federal action of any kind by requiring prior exhaustion. Both sponsors of the Act in the Senate made this clear. Senator Hatch explained § 1997e as follows:

> "In actions relating to alleged violations of the constitutional rights of prisoners, such persons may be required to exhaust internal grievance procedures *before the Attorney General can become involved pursuant to [the Act].*" 126 Cong. Rec. 3716 (1980) (emphasis added).[22]

Senator Bayh, the author of the Act, described the exhaustion provision in similar terms:

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[21] The exhaustion requirement in § 1997e only becomes effective if the Attorney General or a federal district court determines that the available prison grievance procedures comply with standards set forth in subsection (b) of § 1997e. As of this date, the Department of Justice has not certified the inmate grievance procedures of even a single State.

[22] Senator Hatch offered the same explanation on several other occasions in the course of the debate. See 126 Cong. Rec. 9227 (1980) ("Section 7 would establish specific procedures that would be applicable before the Attorney General could enter into an action in behalf of an imprisoned or incarcerated person. Such person would first have had to fully exhaust all internal grievance mechanisms that existed in the institution in which he was confined"); *id.*, at 10005 ("Section 7(D) further clarifies that the administrative grievance procedures established in section 7 are only for the purposes of requiring prisoners to exhaust internal grievance mechanisms before the Attorney General can litigate on his behalf").

> "[I]n the event of a prison inmate's rights being alleged to be violated . . . then before the Justice Department could intervene or initiate suits, the prison inmate or class of inmates would have to pursue all of their administrative remedies within the State law before the Justice Department could intervene under the provisions of [the Act]." *Id.*, at 3970.

In short, in enacting the Civil Rights of Institutionalized Persons Act Congress was focusing on the powers of the Attorney General, and the particular question of prisoners' suits, not on the general question of exhaustion in § 1983 actions. Also revealing as to the limited purpose of § 1997e is Congress' consistent refusal to adopt legislation imposing a general no-exhaustion requirement. Thus, for example, in 1979, a bill was introduced into the Senate providing:

> "No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State." S. 1983, 96th Cong., 1st Sess., § 5 (1979).

The bill was never reported out of committee.

The requirement that plaintiffs exhaust available and adequate administrative remedies—subject to well-developed exceptions—is firmly established in virtually every area of the law. This is dictated in § 1983 actions by common sense, as well as by comity and federalism, where adequate state administrative remedies are available.

If the exhaustion question were properly before us, I would affirm the Court of Appeals.

UNITED STATES *v.* JOHNSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80–1608. Argued February 24, 1982—Decided June 21, 1982

Payton v. *New York*, 445 U. S. 573, held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. Before *Payton* was decided, respondent was arrested on a federal charge by Secret Service agents who had entered his home without an arrest warrant. Subsequently, the Federal District Court denied respondent's pretrial motion to suppress incriminating statements he made after his arrest. This evidence was admitted at his trial and he was convicted. While his case was still pending on direct appeal, *Payton* was decided. On the strength of *Payton*, the Court of Appeals reversed the conviction, holding that *Payton* applied retroactively.

Held: A decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered, except where a case would be clearly controlled by existing retroactivity precedents. Hence, *Payton* is to be applied retroactively to respondent's case. Pp. 542–563.

(a) Respondent's case does not present a retrospectivity problem clearly controlled by existing precedent. Where a decision of this Court merely has applied settled principles to a new set of facts, it has been a foregone conclusion that the rule of the later case applies in earlier cases. Conversely, where the Court has declared a rule of criminal procedure to be "a clear break with the past," it almost invariably has found the new principle nonretroactive. Also, this Court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish the defendant in the first place. Respondent's case does not fit any of these categories, as *Payton* did not apply settled precedent to a new set of facts, did not announce an entirely new and unanticipated principle of law, and did not hold either that the trial court lacked authority to convict Payton or that the Fourth Amendment immunized his conduct from punishment. Pp. 548–554.

(b) The retroactivity question presented here is fairly resolved by applying the *Payton* rule to all cases still pending on direct appeal at the time *Payton* was decided. To do so (1) provides a principle of decision-making consonant with this Court's original understanding in *Linkletter*

v. *Walker*, 381 U. S. 618, and *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, that all newly declared constitutional rules of criminal procedure would apply retrospectively at least to convictions not yet final when the rule was established; (2) comports with this Court's judicial responsibility "to do justice to each litigant on the merits of his own case," *Desist* v. *United States*, 394 U. S. 244, 259 (Harlan, J., dissenting), and to "resolve all cases before us on direct review in light of our best understanding of governing constitutional principles," *Mackey* v. *United States*, 401 U. S. 667, 679 (separate opinion of Harlan, J.); and (3) furthers the goal of treating similarly situated defendants similarly. Pp. 554–556.

(c) There is no merit to the Government's arguments, based on *United States* v. *Peltier*, 422 U. S. 531, against adoption of the above approach to the retroactivity question in this case. Pp. 557–562.

626 F. 2d 753, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ. joined. BRENNAN, J., filed a concurring opinion, *post*, p. 563. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 564.

Elliott Schulder argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, and *Patty Merkamp Stemler*.

John F. Walter, by appointment of the Court, 454 U. S. 1028, argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Payton* v. *New York*, 445 U. S. 573 (1980), this Court held that the Fourth Amendment[1] prohibits the police from making a warrantless and nonconsensual entry into a sus-

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[1] The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

pect's home to make a routine felony arrest. The question before us in the present case is whether the rule announced in *Payton* applies to an arrest that took place before *Payton* was decided.

I

Special Agents Hemenway and Pickering of the United States Secret Service suspected respondent Raymond Eugene Johnson and his codefendant, Oscar Joseph Dodd, of attempting to negotiate a misdelivered United States Treasury check.[2] Proceeding without an arrest warrant, on May 5, 1977, the two agents went to respondent's Los Angeles home and waited outside. Shortly thereafter, respondent and his wife arrived and entered the house.

The agents drew their weapons, approached the doorway and knocked, identifying themselves by fictitious names. When respondent opened the door, he saw the two agents with their guns drawn and their badges raised. Respondent permitted the agents to enter the house. While one agent stood with respondent in the living room, the other searched the premises. The agents then advised respondent of his constitutional rights and interrogated him. When respondent revealed his involvement in the taking of the misdelivered check, the agents formally arrested him. Respondent later signed a written statement admitting his involvement with the check.

Before trial, respondent sought to suppress his oral and written statements as fruits of an unlawful arrest not sup-

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[2] On March 30, 1977, the United States Postal Service mistakenly delivered to Lena Kearney a Treasury check for $4,681.41, payable to Elihu Peterson. Kearney and her sister-in-law sought Dodd's assistance in cashing the check. Accompanied by respondent Johnson and another man, Dodd went to Kearney's residence to discuss methods of cashing the check. The three men eventually departed, taking the check with them.

After Kearney and her sister-in-law related the foregoing events to Special Agent Hemenway, he obtained a warrant for Dodd's arrest. He, however, did not obtain a warrant to arrest respondent. See 626 F. 2d 753, 754–755 (CA9 1980).

ported by probable cause. The United States District Court for the Central District of California found respondent's arrest to be proper and admitted the evidence. App. 7. A jury then convicted respondent of aiding and abetting obstruction of correspondence, in violation of 18 U. S. C. §§ 2 and 1702.[3] The imposition of respondent's sentence was suspended in favor of five years' probation.

By an unreported opinion filed December 19, 1978, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction. Acknowledging that "[i]t certainly would have been preferable had the agents obtained a warrant" for respondent's arrest before entering his residence, the court nonetheless ruled that "if probable cause exists for the arrest, [respondent's] constitutional rights were not violated by the warrantless arrest, even though there may have been time [for the agents] to have obtained a warrant for his arrest." App. to Pet. for Cert. 26a–27a.

On April 15, 1980, while respondent's petition for rehearing was still pending before the Ninth Circuit, this Court decided *Payton* v. *New York*, *supra*.[4] On September 2,

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[3] The jury acquitted respondent on a separate count of aiding and abetting the receipt of stolen Government property. See 18 U. S. C. §§ 2, 641. Respondent's codefendant Dodd was convicted on both counts. In an unreported decision, Dodd's conviction was affirmed summarily on appeal, and is not before us. See *United States* v. *Dodd*, No. 79–1030 (CA9 Feb. 4, 1980), rehearing denied, Mar. 5, 1980.

[4] The Court noted probable jurisdiction in *Payton* on December 11, 1978. 439 U. S. 1044. On March 5, 1979, the Ninth Circuit deferred decision on respondent's petition for rehearing and rehearing en banc pending this Court's decision in *Payton*. App. 8. The Court heard argument in *Payton* on March 26, 1979, but restored the case to the calendar for reargument. See 441 U. S. 930 (1979).

On August 20, 1979, the Ninth Circuit reaffirmed respondent's conviction, in the process amending its initial opinion and denying respondent's petition for rehearing. App. to Pet. for Cert. 14a. Respondent timely filed a second petition for rehearing and suggestion for rehearing en banc, which was still pending in the Court of Appeals when *Payton* was decided.

1980, the Ninth Circuit granted respondent's petition for rehearing, withdrew its prior opinion, and on the strength of *Payton*, now reversed the judgment of conviction. 626 F. 2d 753. "In light of the strong language by the Court in *Payton* emphasizing the special protection the Constitution affords to individuals within their homes," the Court of Appeals held that "the warrantless arrest of Johnson, while he stood within his home, after having opened the door in response to false identification by the agents, constituted a violation of his Fourth Amendment rights." *Id.*, at 757. The Government petitioned for rehearing, arguing that the principles of *Payton* should not apply retroactively to an arrest that had occurred before *Payton* was decided. The Court of Appeals disagreed, denied the petition for rehearing, and amended its opinion to clarify that *Payton* did apply retroactively. App. to Pet. for Cert. 12a.[5]

The Government sought review in this Court. We granted certiorari to consider the retrospective effect, if any, of the Fourth Amendment rule announced in *Payton*. 454 U. S. 814 (1981).[6]

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[5] In a decision issued three months before its initial ruling here, a different panel of the Ninth Circuit had anticipated *Payton*, holding that "absent exigent circumstances, police who have probable cause to arrest a felony suspect must obtain a warrant before entering a dwelling to carry out the arrest." *United States* v. *Prescott*, 581 F. 2d 1343, 1350 (1978). Upon denial of the Government's petition for rehearing in respondent's case, the Court of Appeals made clear that its post-*Payton* reversal of respondent's conviction "rests chiefly upon basic principles common to our decision in *Prescott* and that of the Supreme Court in *Payton*." App. to Pet. for Cert. 13a. The court also noted that it had already held that its ruling in *Prescott* should apply retroactively. See *United States* v. *Blake*, 632 F. 2d 731 (1980).

[6] For the purposes of this case, the Government assumes the correctness of the Court of Appeals' ruling that, if applied to these facts, *Payton* would require exclusion of respondent's statements. Brief for United States 12–13, n. 6. We therefore need not examine the Court of Appeals' conclusion on that issue.

II

"[T]he federal constitution has no voice upon the subject" of retrospectivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). Before 1965, when this Court decided *Linkletter* v. *Walker*, 381 U. S. 618, "both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions." *Robinson* v. *Neil*, 409 U. S. 505, 507 (1973), citing *Norton* v. *Shelby County*, 118 U. S. 425, 442 (1886), and *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940).[7]

In *Linkletter*, however, the Court concluded "that the Constitution neither prohibits nor requires [that] retrospective effect" be given to any "new" constitutional rule. 381 U. S., at 629. Since *Linkletter*, the Court's announcement of a constitutional rule in the realm of criminal procedure has frequently been followed by a separate decision explaining whether, and to what extent, that rule applies to past, pending, and future cases. See generally Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557 (1975).

Linkletter itself addressed the question whether the Fourth Amendment exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), should apply to state convictions that had become final before *Mapp* was decided.[8] At the outset, the *Linkletter* Court noted that cases still pending on direct review when *Mapp* was handed down had already received the

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[7] The pre-1965 requirement that all constitutional rules receive full retroactive application derived from the Blackstonian notion "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Linkletter* v. *Walker*, 381 U. S. 618, 622–623 (1965), citing 1 W. Blackstone, Commentaries 69 (15th ed. 1809).

[8] "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed [or a petition for certiorari finally denied, all] before our decision in *Mapp* v. *Ohio*." *Linkletter* v. *Walker*, 381 U. S., at 622, n. 5. See also *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 409, n. 3 (1966).

benefit of *Mapp*'s rule. See 381 U. S., at 622, n. 4, citing *Ker* v. *California*, 374 U. S. 23 (1963); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); and *Stoner* v. *California*, 376 U. S. 483 (1964). This limited retrospective application of *Mapp* was consistent with the common-law rule, recognized in both civil and criminal litigation, "that a change in law will be given effect while a case is on direct review." 381 U. S., at 627, citing *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801).

To determine whether a particular ruling should also extend to cases that were already final, *Linkletter* directed courts to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U. S., at 629. Employing that test, the Court concluded that the *Mapp* rule should not apply to convictions that had become final before *Mapp* was decided.

The following Term, in *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (1966), the Court applied *Linkletter*'s analysis to hold the Fifth Amendment rule of *Griffin* v. *California*, 380 U. S. 609 (1965) (barring comment on a state defendant's failure to testify), nonretroactive to judgments of conviction made final before *Griffin* was decided. The Court again found no "question of the applicability of the *Griffin* rule to cases still pending on direct review at the time it was announced." 382 U. S., at 409, n. 3, citing *O'Connor* v. *Ohio*, 382 U. S. 286 (1965). Thus, after *Linkletter* and *Shott*, it appeared that all newly declared constitutional rules of criminal procedure would apply retrospectively at least to judgments of conviction not yet final when the rule was established.

In *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), and *Stovall* v. *Denno*, 388 U. S. 293 (1967), however, the Court departed from that basic principle. Those cases held that, in the interest of justice, the Court may balance three factors to determine whether a "new" constitutional rule should be ret-

rospectively or prospectively applied: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.*, at 297. See also *Johnson* v. *New Jersey*, 384 U. S., at 728. Because the outcome of that balancing process might call for different degrees of retroactivity in different cases, the Court concluded that "no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review." *Stovall* v. *Denno*, 388 U. S., at 300. See *Johnson* v. *New Jersey*, 384 U. S., at 732.

Because the balance of the three *Stovall* factors inevitably has shifted from case to case, it is hardly surprising that, for some, "the subsequent course of *Linkletter* became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *Mackey* v. *United States*, 401 U. S. 667, 676 (1971) (separate opinion of Harlan, J.). At one extreme, the Court has regularly given complete retroactive effect to new constitutional rules whose major purpose "is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Williams* v. *United States*, 401 U. S. 646, 653 (1971) (plurality opinion). See also *id.*, at 653, n. 6; *Brown* v. *Louisiana*, 447 U. S. 323, 328–330 (1980) (plurality opinion); *Hankerson* v. *North Carolina*, 432 U. S. 233, 243 (1977); *Gosa* v. *Mayden*, 413 U. S. 665, 679 (1973) (plurality opinion); *Ivan V.* v. *City of New York*, 407 U. S. 203, 205 (1972).

At the other extreme, the Court has applied some standards only to future cases, denying the benefit of the new rule even to the parties before the Court. See, *e. g.*, *Morrissey* v. *Brewer*, 408 U. S. 471, 490 (1972) (establishing basic requirements applicable only to "future revocations of parole"). Cf. *Johnson* v. *New Jersey*, 384 U. S., at 733, citing *England*

v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964), and *James* v. *United States*, 366 U. S. 213 (1961). As an intermediate position, the Court has applied a change in the law to all future litigants, but retroactively only to the parties at bar. See, *e. g.*, *Stovall* v. *Denno*, 388 U. S., at 301; *DeStefano* v. *Woods*, 392 U. S. 631, 633 (1968); *Adams* v. *Illinois*, 405 U. S. 278, 284–285 (1972) (plurality opinion); *Michigan* v. *Payne*, 412 U. S. 47 (1973).

In a consistent stream of separate opinions since *Linkletter*, Members of this Court have argued against selective awards of retroactivity. Those opinions uniformly have asserted that, at a minimum, all defendants whose cases were still pending on direct appeal at the time of the law-changing decision should be entitled to invoke the new rule.[9]

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[9] See, *e. g.*, *Brown* v. *Louisiana*, 447 U. S. 323, 337 (1980) (POWELL, J., with whom STEVENS, J., joined, concurring in judgment); *Harlin* v. *Missouri*, 439 U. S. 459, 460 (1979) (POWELL, J., concurring in judgments); *Hankerson* v. *North Carolina*, 432 U. S. 233, 245 (1977) (MARSHALL, J., concurring in judgment); *id.*, at 246 (POWELL, J., concurring in judgment); *United States* v. *Peltier*, 422 U. S. 531, 543 (1975) (Douglas, J., dissenting); *Daniel* v. *Louisiana*, 420 U. S. 31, 33, and n. (1975) (Douglas, J., dissenting); *Michigan* v. *Tucker*, 417 U. S. 433, 461 (1974) (Douglas, J., dissenting); *Michigan* v. *Payne*, 412 U. S. 47, 58 (1973) (Douglas, J., dissenting); *id.*, at 59 (MARSHALL, J., dissenting); *Adams* v. *Illinois*, 405 U. S. 278, 286 (1972) (Douglas, J., with whom MARSHALL, J., concurred, dissenting); *Mackey* v. *United States*, 401 U. S. 667, 675 (1971) (separate opinion of Harlan, J.); *id.*, at 713 (Douglas, J., with whom Black, J., concurred, dissenting); *Williams* v. *United States*, 401 U. S. 646, 665 (1971) (MARSHALL, J., concurring in part and dissenting in part); *Coleman* v. *Alabama*, 399 U. S. 1, 19 (1970) (Harlan, J., concurring in part and dissenting in part); *Von Cleef* v. *New Jersey*, 395 U. S. 814, 817 (1969) (Harlan, J., concurring in result); *Jenkins* v. *Delaware*, 395 U. S. 213, 222 (1969) (Harlan, J., dissenting); *Desist* v. *United States*, 394 U. S. 244, 255 (1969) (Douglas, J., dissenting); *id.*, at 256 (Harlan, J., dissenting); *id.*, at 269 (Fortas, J., dissenting); *Fuller* v. *Alaska*, 393 U. S. 80, 82 (1968) (Douglas, J., dissenting); *DeStefano* v. *Woods*, 392 U. S. 631, 635 (1968) (Douglas, J., with whom Black, J., joined, dissenting); *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967) (Douglas, J., dissenting); *id.*, at 303 (Black, J., dissenting); *Johnson*

In *Desist* v. *United States*, 394 U. S. 244, 256 (1969) (dissenting opinion), and *Mackey* v. *United States*, 401 U. S., at 675 (separate opinion), Justice Harlan presented a comprehensive analysis in support of that principle. In his view, failure to apply a newly declared constitutional rule at least to cases pending on direct review at the time of the decision violated three norms of constitutional adjudication.

First, Justice Harlan argued, the Court's "ambulatory retroactivity doctrine," *id.*, at 681, conflicts with the norm of principled decisionmaking. "Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound. Others rationalized this resort to prospectivity as a 'technique' that provided an 'impetus . . . for the implementation of long overdue reforms, which otherwise could not be practicably effected.'" *Id.*, at 676, citing *Jenkins* v. *Delaware*, 395 U. S. 213, 218 (1969). "The upshot of this confluence of viewpoints," 401 U. S., at 676, was that the coalitions favoring nonretroactivity had realigned from case to case, inevitably generating a welter of "incompatible rules and inconsistent principles," *Desist* v. *United States*, 394 U. S., at 258. See also *Michigan* v. *Payne*, 412 U. S., at 61 (MARSHALL, J., dissenting) ("principled adjudication requires the Court to abandon the charade of carefully balancing countervailing considerations when deciding the question of retroactivity").

Second, Justice Harlan found it difficult to accept the notion that the Court, as a judicial body, could apply a "'new' constitutional rule entirely prospectively, while making an exception only for the particular litigant whose case was chosen as the vehicle for establishing that rule." *Desist* v.

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v. *New Jersey*, 384 U. S. 719, 736 (1966) (Black, J., with whom Douglas, J., joined, dissenting); *Whisman* v. *Georgia*, 384 U. S. 895 (1966) (Douglas, J., dissenting); *Tehan* v. *United States ex rel. Shott*, 382 U. S., at 419 (Black, J., with whom Douglas, J., joined, dissenting); *Linkletter* v. *Walker*, 381 U. S., at 640 (Black, J., with whom Douglas, J., joined, dissenting).

United States, 394 U. S., at 258 (dissenting opinion). A legislature makes its new rules "wholly or partially retroactive or only prospective as it deems wise." *Mackey* v. *United States*, 401 U. S., at 677 (Harlan, J., dissenting). This Court, however,

> "announce[s] new constitutional rules . . . only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules. . . . Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review." *Id.*, at 678–679.

Third, Justice Harlan asserted that the Court's selective application of new constitutional rules departed from the principle of treating similarly situated defendants similarly:[10]

> "[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who

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[10] Evenhanded justice for similarly situated litigants was the principal theme sounded by the dissenting opinions of Justices Black and Douglas. See cases cited in n. 9, *supra*. The views of these Justices diverged from those of Justice Harlan, however, on the question whether equal treatment also requires retroactive application of newly announced constitutional rules to all cases arising on collateral attack. Compare *Desist* v. *United States*, 394 U. S., at 255 (Douglas, J., dissenting), with *id.*, at 260–269 (Harlan, J., dissenting). See also *Adams* v. *Illinois*, 405 U. S., at 287, and n. 4 (Douglas, J., dissenting). Members of the Court continue to offer views on this troublesome question. Compare *Hankerson* v. *North Carolina*, 432 U. S., at 246, and n. (MARSHALL, J., concurring in judgment), with *id.*, at 248 (POWELL, J., concurring in judgment).

alone will receive the benefit of a 'new' rule of constitutional law." *Desist* v. *United States*, 394 U. S., at 258–259 (dissenting opinion).

Justice Harlan suggested one simple rule to satisfy all three of his concerns. "I have concluded that *Linkletter* was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." *Id.*, at 258. "[A] proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was." *Mackey* v. *United States*, 401 U. S., at 681 (separate opinion).

We now agree with Justice Harlan that "'[r]etroactivity' must be rethought," *Desist* v. *United States*, 394 U. S., at 258 (dissenting opinion). We therefore examine the circumstances of this case to determine whether it presents a retroactivity question clearly controlled by past precedents, and if not, whether application of the Harlan approach would resolve the retroactivity issue presented in a principled and equitable manner.

III

A

At the outset, we must first ask whether respondent's case presents a retrospectivity problem clearly controlled by existing precedent. Re-examination of the post-*Linkletter* decisions convinces us that in three narrow categories of cases, the answer to the retroactivity question has been effectively determined, not by application of the *Stovall* factors, but rather, through application of a threshold test.[11]

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[11] These cases therefore have not proved "readily susceptible of analysis under the *Linkletter* line of cases." *Robinson* v. *Neil*, 409 U. S. 505, 508 (1973). The dissent's accusation that these categories exclude the "most obvious" line of cases—those announcing rules relating to the truth-finding

First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. See, *e. g.*, *Dunaway* v. *New York*, 442 U. S. 200, 206 (1979) (reviewing application of the rule in *Brown* v. *Illinois*, 422 U. S. 590 (1975)); *Spinelli* v. *United States*, 393 U. S. 410, 412 (1969) ("further explicat-[ing]" the principles of *Aguilar* v. *Texas*, 378 U. S. 108 (1964)); *Desist* v. *United States*, 394 U. S., at 263 (Harlan, J., dissenting).

Conversely, where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," *Desist* v. *United States*, 394 U. S., at 248, it almost invariably has gone on to find such a newly minted principle nonretroactive. See *United States* v. *Peltier*, 422 U. S. 531, 547, n. 5 (1975) (BRENNAN, J., dissenting) (collecting cases). In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the "'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course," *Williams* v. *United States*, 401 U. S., at 659 (plurality opinion). Once the Court has found that the new rule was unanticipated, the second and third *Stovall* factors—reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule—have virtually

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function, *post*, at 567—misses our point. In those cases, the retroactivity decision *has* in fact turned on a traditional application of the *Stovall* factors, with the central issue in dispute often being the major purpose to be served by the new standard. Compare *Brown* v. *Louisiana*, 447 U. S. 323 (1980) (plurality opinion), with *id.*, at 337 (REHNQUIST, J., dissenting) (disagreeing over the "major purpose" of the unanimous six-person jury rule of *Burch* v. *Louisiana*, 441 U. S. 130 (1979)).

compelled a finding of nonretroactivity. See, *e. g.*, *Gosa* v. *Mayden*, 413 U. S., at 672–673, 682–685 (plurality opinion); *Michigan* v. *Payne*, 412 U. S., at 55–57.[12]

Third, the Court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place. The Court has invalidated inconsistent prior judgments where its reading of a particular constitutional guarantee immunizes a defendant's conduct from punishment, see, *e. g.*, *United States* v. *United States Coin & Currency*, 401 U. S. 715, 724 (1971) (penalty against assertion of Fifth Amendment privilege against self-incrimination), or serves "to prevent [his] trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of [that] trial," *Robinson* v. *Neil*, 409 U. S., at 509 (double jeopardy). In such cases, the Court has relied less on the technique of retroactive application than on the notion that the prior inconsistent judgments or sentences were void *ab initio*. See, *e. g.*, *Moore* v. *Illinois*, 408 U. S. 786, 800 (1972) (retroactive application of Eighth Amendment ruling in *Furman* v. *Georgia*, 408 U. S. 238 (1972)); *Ashe* v. *Swenson*, 397 U. S. 436, 437, n. 1 (1970) (retroactive application of double jeopardy ruling in *Benton* v. *Maryland*, 395 U. S. 784 (1969)). See also *Gosa* v. *Mayden*, 413 U. S., at 693 (MARSHALL, J., dissenting); *Michigan* v. *Payne*, 412 U. S., at 61 (MARSHALL, J., dissenting) (rulings are fully retroactive when the "Court

[12] In the civil context, in contrast, the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. See, *e. g.*, *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106 (1971). Once it has been determined that a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," the Court has gone on to examine the history, purpose, and effect of the new rule, as well as the inequity that would be imposed by its retroactive application. *Id.*, at 106–107. See also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 499 (1968).

has held that the trial court lacked jurisdiction in the traditional sense").

Respondent's case neatly fits none of these three categories. First, *Payton* v. *New York* did not simply apply settled precedent to a new set of facts. In *Payton*, the Court acknowledged that the "important constitutional question presented" there had been "expressly left open in a number of our prior opinions." 445 U. S., at 574 and 575, n. 1, citing *United States* v. *Watson*, 423 U. S. 411, 418, n. 6 (1976); *Gerstein* v. *Pugh*, 420 U. S. 103, 113, n. 13 (1975); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–481 (1971); and *Jones* v. *United States*, 357 U. S. 493, 499–500 (1958).

By the same token, however, *Payton* also did not announce an entirely new and unanticipated principle of law. In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law," *Milton* v. *Wainwright*, 407 U. S. 371, 381, n. 2 (1972) (Stewart, J., dissenting), unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one," *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 498 (1968). Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, see, *e. g.*, *Desist* v. *United States*, 394 U. S. 244 (1969); *Williams* v. *United States*, 401 U. S. 646 (1971), or disapproves a practice this Court arguably has sanctioned in prior cases, see, *e. g.*, *Gosa* v. *Mayden*, 413 U. S., at 673 (plurality opinion); *Adams* v. *Illinois*, 405 U. S., at 283; *Johnson* v. *New Jersey*, 384 U. S., at 731, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. See, *e. g.*, *Gosa* v. *Mayden*, 413 U. S., at 673 (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed for many decades"); *Stovall* v. *Denno*, 388 U. S., at 299–300. See also *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 107 (1971); *Cipriano*

v. *City of Houma*, 395 U. S. 701 (1969); *Milton* v. *Wainwright*, 407 U. S., at 381–382, n. 2 (Stewart, J., dissenting) ("sharp break" occurs when "decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon").

Payton did none of these. *Payton* expressly overruled no clear past precedent of this Court on which litigants may have relied. Nor did *Payton* disapprove an established practice that the Court had previously sanctioned. To the extent that the Court earlier had spoken to the conduct engaged in by the police officers in *Payton*, it had deemed it of doubtful constitutionality.[13] The Court's own analysis in *Payton* makes it clear that its ruling rested on both long-recognized principles of Fourth Amendment law and the weight of historical authority as it had appeared to the Framers of the Fourth Amendment.[14] Finally, *Payton* overturned no long-

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[13] At least since *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), the Court had acknowledged that the Fourth Amendment accords special protection to the home. *McDonald* v. *United States*, 335 U. S. 451, 456 (1948), stated that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." See also *Johnson* v. *United States*, 333 U. S. 10, 13–15 (1948). While ultimately declining to decide whether a warrant is necessary to effect a home arrest, *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–475 (1971) (footnote omitted), had declared that "a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" See also *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 561 (1976) ("the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection").

[14] The *Payton* Court relied on the "'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." 445 U. S., at 586, citing *Coolidge* v. *New Hampshire*, 403 U. S., at 477. The Court further recognized that the ex-

standing practice approved by a near-unanimous body of lower court authority.[15] *Payton* therefore does not fall into that narrow class of decisions whose nonretroactivity is effec-

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press language of the Fourth Amendment "has drawn a firm line at the entrance to the house" in "terms that apply equally to seizures of property and to seizures of persons." 445 U. S., at 590. After examining the common-law understanding of an officer's authority to arrest a suspect in his own home, *id.*, at 591–598, the Court concluded that "the weight of authority as it appeared to the Framers [of the Fourth Amendment] was to the effect that a warrant was required [before a home arrest], or at the minimum that there were substantial risks in proceeding without one." *Id.*, at 596.

[15] While the practice invalidated in *Payton* had found support in some state courts, those decisions evinced "by no means the kind of virtual unanimity," *id.*, at 600, required to make *Payton* a clear break with the past. In *Payton*, the Court noted that at the time of its decision, "'[o]nly 24 of the 50 States currently sanction warrantless entries into the home to arrest, . . . and there is an obvious declining trend." *Ibid.* In California, where the present respondent's case arose, the State Supreme Court had held more than a year before respondent's arrest that, under the Fourth Amendment and its state constitutional counterpart, warrantless arrests within the home were *per se* unreasonable in the absence of exigent circumstances. See *People* v. *Ramey*, 16 Cal. 3d 263, 275–276, 545 P. 2d 1333, 1340–1341, cert. denied, 429 U. S. 929 (1976).

Of the seven United States Courts of Appeals that had considered the question before *Payton*, five had expressed the view that warrantless home arrests were unconstitutional. 445 U. S., at 575, and n. 4. Three other Circuits had assumed, without expressly deciding, that such searches were unlawful. *Ibid.* After one of those decisions, in 1978, the Department of Justice instructed federal law enforcement agencies to follow the practice of procuring arrest warrants before entering a suspect's home to arrest him without exigent circumstances. Brief for United States 33, n. 20.

In the Ninth Circuit, where respondent was arrested, it has been said that "law enforcement officials knew that th[e] circuit's law was unsettled but that there was some drift toward a warrant requirement." *United States* v. *Blake*, 632 F. 2d, at 736. *United States* v. *Phillips*, 497 F. 2d 1131, 1135 (CA9 1974), had suggested in dictum that warrants are required before officers may enter a private dwelling to effect an arrest. In *United States* v. *Calhoun*, 542 F. 2d 1094, 1102 (CA9 1976), cert. denied *sub nom. Stephenson* v. *United States*, 429 U. S. 1064 (1977), it was observed that

tively preordained because they unmistakably signal "a clear break with the past," *Desist* v. *United States*, 394 U. S., at 248.

It is equally plain that *Payton* does not fall into the third category of cases that do not pose difficult retroactivity questions. *Payton* did not hold that the trial court lacked authority to convict or sentence Theodore Payton, nor did *Payton*'s reading of the Fourth Amendment immunize Payton's conduct from punishment. The holding in *Payton* did not prevent the defendant's trial from taking place; rather, it reversed the New York Court of Appeals' judgment and remanded for a new trial to be conducted without unconstitutionally obtained evidence.

B

Having determined that the retroactivity question here is not clearly controlled by our prior precedents, we next must ask whether that question would be fairly resolved by applying the rule in *Payton* to all cases still pending on direct appeal at the time when *Payton* was decided. Answering that question affirmatively would satisfy each of the three concerns stated in Justice Harlan's opinions in *Desist* and *Mackey*.

First, retroactive application of *Payton* to all previously nonfinal convictions would provide a principle of decisionmaking consonant with our original understanding of retroactivity in *Linkletter* and *Shott*. Moreover, such a principle would be one capable of general applicability, satisfying Justice Harlan's central concern: "Refusal to apply new constitutional rules to all cases arising on direct review . . . tends to cut this Court loose from the force of precedent, allowing us

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the Government had agreed that, absent exigent circumstances, a warrantless and nonconsensual entry into a suspect's home would be illegal. *United States* v. *Prescott*, 581 F. 2d, at 1350, then squarely held such arrests unconstitutional. See n. 5, *supra*.

to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis* . . . a force which ought properly to bear on the judicial resolution of any legal problem." *Mackey* v. *United States*, 401 U. S., at 680–681 (separate opinion).

Second, application of *Payton* to cases pending on direct review would comport with our judicial responsibilities "to do justice to each litigant on the merits of his own case," *Desist* v. *United States*, 394 U. S., at 259 (Harlan, J., dissenting), and to "resolve all cases before us on direct review in light of our best understanding of governing constitutional principles." *Mackey* v. *United States*, 401 U. S., at 679 (separate opinion of Harlan, J.). The Court of Appeals held that the circumstances of respondent's arrest violated *Payton*, and the Government does not dispute that contention. See n. 6, *supra*. It would be ironic indeed were we now to reverse a judgment applying *Payton*'s rule, when in *Payton* itself, we reversed a directly contrary judgment of the New York Court of Appeals. As Justice Harlan noted in *Desist:* "If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced." 394 U. S., at 259.

Third, application of the Harlan approach to respondent's case would further the goal of treating similarly situated defendants similarly. The Government contends that respondent may not invoke *Payton* because he was arrested before *Payton* was decided. Yet it goes without saying that Theodore Payton also was arrested before *Payton* was decided, and he received the benefit of the rule in his case. Furthermore, at least one other defendant whose conviction was not final when *Payton* issued benefited from *Payton*'s rule, although he, too, was arrested before *Payton* was decided.[16]

[16] The New York Court of Appeals affirmed Payton's conviction along with that of Obie Riddick. See *Payton* v. *New York*, 445 U. S., at

An approach that resolved all nonfinal convictions under the same rule of law would lessen the possibility that this Court might mete out different constitutional protection to defendants simultaneously subjected to identical police conduct.[17]

578–579. This Court noted probable jurisdiction in Riddick's appeal, consolidated it with Payton's, then reversed both convictions. *Id.*, at 603.

In theory, the Court could have held Riddick's jurisdictional statement pending the disposition in Payton's case, then vacated and remanded the case for reconsideration in light of *Payton*. Such a course was taken in seven other nonfinal cases. See *Gonzalez* v. *New York*, 446 U. S. 902 (1980); *Brown* v. *Florida*, 446 U. S. 902 (1980); *Busch* v. *Florida*, 446 U. S. 902 (1980); *Vidal* v. *New York*, 446 U. S. 903 (1980); *Gordon* v. *New York*, 446 U. S. 903 (1980); *Gayle* v. *New York*, 446 U. S. 905 (1980); and *Dunagan* v. *Illinois*, 446 U. S. 905 (1980). Alternatively, the Court could have given all these cases plenary review.

Potential for unequal treatment is inherent in this process. As Justice Douglas "recalled," when the Court decided *Miranda* v. *Arizona*, 384 U. S. 436 (1966):

"[S]ome 80 cases were presented raising the same question. We took four of them and held the rest and then disposed of each of the four, applying the new procedural rule retroactively. But as respects the rest of the pending cases we denied any relief. . . . Yet it was sheer coincidence that those precise four were chosen. Any other single case in the group or any other four would have been sufficient for our purposes." *Desist* v. *United States*, 394 U. S., at 255 (dissenting opinion).

The dissent argues that "we long ago resolved the problem of the appearance of inequity that arises whenever we limit the retroactive reach of a new principle of law." *Post*, at 566. But the dissent mischaracterizes both the problem and this Court's treatment of it. The problem is not merely the *appearance* of inequity, but the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a retroactively applied rule. As the persistently voiced dissatisfaction with the Court's "ambulatory retroactivity doctrine" has revealed, see n. 9, *supra*, until now this Court has not "resolved" this problem so much as it has chosen to tolerate it. The time for toleration has come to an end.

[17] We are aware, of course, that many considerations affect a defendant's progress through the judicial system, and that the speed of appellate review will differ from State to State, Circuit to Circuit, and case to case. Even under our approach, it may be unavoidable that some similarly

IV

Against adoption of this approach, the Government raises four arguments based on *United States* v. *Peltier*, 422 U. S. 531 (1975). None is persuasive.

The Government first cites *Peltier*'s holding: that the Fourth Amendment rule announced in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), should not apply retroactively to a case pending on appeal when *Almeida-Sanchez* was announced. By so holding, the Government suggests,

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situated defendants will be treated differently. Cf. *Williams* v. *United States*, 401 U. S., at 657, and n. 9 (plurality opinion).

The Government suggests an approach, however, that virtually ensures that such anomalies will occur. The Government concedes that the *Payton* rule should apply to any pre-*Payton* case arising in a Circuit where the United States Court of Appeals already had held authoritatively that *Payton*-type searches were unlawful. Brief for United States 22–26. When respondent was arrested, two Courts of Appeals had invalidated warrantless home arrests conducted in the absence of exigent circumstances. See *Dorman* v. *United States*, 140 U. S. App. D. C. 313, 435 F. 2d 385 (1970); *United States* v. *Shye*, 492 F. 2d 886 (CA6 1974). Thus, under the Government's theory, the statements of a suspect arrested in the District of Columbia, on the same day as respondent was arrested in Los Angeles and under identical circumstances, should be excluded while respondent's statements should not. Moreover, under the Government's reasoning, this Court would be obliged to reverse a ruling of the Court of Appeals for the Ninth Circuit excluding those statements, but not an identical ruling from the District of Columbia Circuit in a parallel case.

The dissent takes a different tack. Arguing that "inherent arbitrariness" arises whenever lines are drawn in this area, the dissent suggests that the "best way to deal with this problem" is to continue to make retroactivity decisions by picking and choosing from among similarly situated defendants. See *post*, at 568. By clinging to this view, the dissent, and not the Court, "is fooling itself." *Ibid.* This Court has no power to speed up or slow down the appellate process in the many tribunals throughout the country to ensure similar treatment of similarly situated defendants. The Court does, however, have the power to eliminate the obvious unfairness that results when it gives only the most conveniently situated defendant the retrospective benefit of a newly declared rule.

Peltier declared a principle that controls the issue of retroactivity for all Fourth Amendment rulings.[18]

Upon examination, however, the retroactivity question posed here differs from that presented in *Peltier*. As the Government concedes, *Payton* overturned neither a statute nor any consistent judicial history approving nonconsensual, warrantless home entries. See Brief for United States 30, n. 18. Thus, its nonretroactivity is not preordained under the "clear break" principles stated above. In *Peltier*, in contrast, the Court noted that *Almeida-Sanchez* had invalidated a form of search previously sanctioned by "a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval." 422 U. S., at 541. See also *Almeida-Sanchez* v. *United States*, 413 U. S., at 278 (POWELL, J., concurring) ("While the question is one of first impression in this Court," the practice disapproved had "been consistently approved by the judiciary"); *id.*, at 298–299, n. 10 (WHITE, J., dissenting) (35 of 36 judges in 20 Court of Appeals cases had approved the invalidated practice).

Because *Almeida-Sanchez* had overturned a longstanding practice to which this Court had not spoken, but which a near-unanimous body of lower court authority had approved, it represented a "clear break" with the past. For that reason alone, under controlling retroactivity precedents, the nonretroactive application of *Almeida-Sanchez* would have been appropriate even if the case had involved no Fourth Amendment question. In that respect, *Peltier* resembles several earlier decisions that held "new" Fourth Amendment

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[18] The dissent shares this mistaken impression. In support of its claim, the dissent cites *Peltier*'s suggestion that every decision by this Court involving the exclusionary rule has been "accorded only prospective application." *Post*, at 564, citing 422 U. S., at 535. As *Peltier* recognized with discomfort, however, *Linkletter* itself—the first of the modern retroactivity cases—acknowledged the application of the *Mapp* exclusionary rule to cases that were pending on direct review at the time that *Mapp* was decided. See 422 U. S., at 535, n. 5.

doctrine nonretroactive, not on the ground that all Fourth Amendment rulings apply only prospectively, but because the particular decisions being applied "so change[d] the law that prospectivity [was] arguably the proper course." *Williams* v. *United States*, 401 U. S., at 659 (plurality opinion) (refusing to apply retroactively *Chimel* v. *California*, 395 U. S. 752 (1969), which overruled *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), and *Harris* v. *United States*, 331 U. S. 145 (1947)). See also *Desist* v. *United States*, 394 U. S. 244 (1969) (refusing to apply retroactively *Katz* v. *United States*, 389 U. S. 347 (1967), which overruled *Goldman* v. *United States*, 316 U. S. 129 (1942), and *Olmstead* v. *United States*, 277 U. S. 438 (1928)).

The Government bases its second argument on *Peltier*'s broad language: "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had *knowledge, or may properly be charged with knowledge*, that the search was unconstitutional under the Fourth Amendment" (emphasis added). 422 U. S., at 542. The Government reads this language to require that new Fourth Amendment rules must be denied retroactive effect in all cases except those in which law enforcement officers failed to act in good-faith compliance with then-prevailing constitutional norms.

The Government does not seriously suggest that the retroactivity of a given Fourth Amendment ruling should turn solely on the subjective state of a particular arresting officer's mind. Instead, it offers an "objective" test: that law enforcement officers "may properly be charged with knowledge" of all "settled" Fourth Amendment law. Under the Government's theory, because the state of Fourth Amendment law regarding warrantless home arrests was "unsettled" before *Payton*, that ruling should not apply retroactively even to cases pending on direct appeal when *Payton* was decided. See Brief for United States 14–19, 34–38.

Yet the Government's reading of *Peltier* would reduce its own "retroactivity test" to an absurdity. Under this view, the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases. But as we have seen above, cases involving simple application of clear, pre-existing Fourth Amendment guidelines raise no real questions of retroactivity at all. Literally read, the Government's theory would automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application.

The Government's third claim is that *Peltier*'s logic suggests that retroactive application of Fourth Amendment decisions like *Payton*—even to cases pending on direct review—would not serve the policies underlying the exclusionary rule. Cf. 422 U. S., at 536–542. Yet viewed in the light of *Peltier*'s holding, this assertion also fails. *Peltier* suggested only that retroactive application of a Fourth Amendment ruling that worked a "sharp break" in the law, like *Almeida-Sanchez*, would have little deterrent effect, because law enforcement officers would rarely be deterred from engaging in a practice they never expected to be invalidated. See 422 U. S., at 541–542.

This logic does not apply to a ruling like *Payton*, that resolved a previously unsettled point of Fourth Amendment law. Because this Court cannot rule on every unsettled Fourth Amendment question, years may pass before the Court finally invalidates a police practice of dubious constitutionality. See, *e. g.*, *Desist* v. *United States*, 394 U. S., at 275 (Fortas, J., dissenting) (arguing that the "physical-trespass" wiretap rule of *Olmstead* v. *United States*, 277 U. S. 438 (1928), had been moribund for 17 years before it was formally overruled). Long before *Payton*, for example, this Court had questioned the constitutionality of warrantless home arrests. See n. 13, *supra*. Furthermore, the Court's

opinions consistently had emphasized that, in light of the constitutional protection traditionally accorded to the privacy of the home, police officers should resolve any doubts regarding the validity of a home arrest in favor of obtaining a warrant. See, *e. g.*, *Johnson* v. *United States*, 333 U. S. 10, 14 (1948) ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers").

If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior.[19] Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach." *Desist* v. *United States*, 394 U. S., at 277 (Fortas, J., dissenting).

The Government finally argues that retroactive application of *Payton*, even to a case pending on direct appeal, would accomplish nothing but the discharge of a wrongdoer. Justice Harlan gave the answer to this assertion. "We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes

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[19] The record in this case, for example, does not explain why respondent's arresting officers failed to obtain a warrant for his arrest, when they did obtain a warrant to arrest his codefendant. See n. 2, *supra*.

before us, we must grant the same relief or give a principled reason for acting differently." *Desist* v. *United States*, 394 U. S., at 258 (dissenting opinion). Applying *Payton* to convictions that were not yet final when *Payton* issued would accomplish the first step toward "turning our backs on the *ad hoc* approach that has so far characterized our decisions in the retroactivity field and proceeding to administer the doctrine on principle." *Jenkins* v. *Delaware*, 395 U. S., at 224 (Harlan, J., dissenting).

V

To the extent necessary to decide today's case, we embrace Justice Harlan's views in *Desist* and *Mackey*. We therefore hold that, subject to the exceptions stated below, a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.

By so holding, however, we leave undisturbed our precedents in other areas. First, our decision today does not affect those cases that would be clearly controlled by our existing retroactivity precedents. Second, because respondent's case arises on direct review, we need not address the retroactive reach of our Fourth Amendment decisions to those cases that still may raise Fourth Amendment issues on collateral attack.[20] Cf. n. 10, *supra*. Third, we express no view on the retroactive application of decisions construing any constitutional provision other than the Fourth Amendment.[21]

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[20] After *Stone* v. *Powell*, 428 U. S. 465 (1976), the only cases raising Fourth Amendment challenges on collateral attack are those federal habeas corpus cases in which the State has failed to provide a state prisoner with an opportunity for full and fair litigation of his claim, analogous federal cases under 28 U. S. C. § 2255, and collateral challenges by state prisoners to their state convictions under postconviction relief statutes that continue to recognize Fourth Amendment claims.

[21] The logic of our ruling, however, is not inconsistent with our precedents giving complete retroactive effect to constitutional rules whose purpose is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function. See, *e. g.*, *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977); *Ivan V.* v. *City of New York*, 407 U. S. 203 (1972). De-

Finally, all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co.* v. *Huson*, 404 U. S., at 106–107. See n. 12, *supra*.

Respondent's case was pending on direct appeal when *Payton* v. *New York* was decided. Because the Court of Appeals correctly held that the rule in *Payton* should apply to respondent's case, its judgment is affirmed.[2]

It is so ordered.

JUSTICE BRENNAN, concurring.

I join the Court's opinion on my understanding that the decision leaves undisturbed our retroactivity precedents as ap-

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pending on the constitutional provision involved, additional factors may warrant giving a particular ruling retroactive effect beyond those cases pending on direct review. See *Hankerson* v. *North Carolina*, 432 U. S., at 248, n. 2 (POWELL, J., concurring in judgment).

Curiously, the dissent faults us not only for limiting our ruling to the only context properly presented by this case—the Fourth Amendment—but also for preserving, rather than overruling, clearly controlling retroactivity precedents. See *post*, at 568. The dissent then recasts those precedents in its own simplistic way, arguing that rules related to truth-finding automatically receive full retroactive effect, while implying that all other rules—including Fourth Amendment rules—should receive none.

There are, however, two problems with this. First, the Court's decisions regularly giving complete retroactive effect to truth-finding rules have in no way required that newly declared Fourth Amendment rulings be denied all retroactive effect. For the reasons already stated, retroactive application of Fourth Amendment rules at least to cases pending on direct review furthers the policies underlying the exclusionary rule. Second, and more important, the Fourth Amendment "rule" urged by the dissent is far from a "perfectly good" one. *Ibid.* As we already have shown, that "rule" condones obviously inequitable treatment of similarly situated litigants and judicial injustice to individual litigants.

[2] The question on which we granted certiorari encompassed one other issue: whether the Court of Appeals correctly concluded that its own decision in *United States* v. *Prescott*, 581 F. 2d 1343 (1978), applies retroactively to respondent's arrest. See n. 5, *supra*. Because we hold that the principles of our decision in *Payton* apply retroactively to respondent's case, we need not disturb the Court of Appeals' ruling regarding the retroactive application of its own prior decision.

plied to convictions final at the time of decision. See, *e. g.*, *Stovall* v. *Denno*, 388 U. S. 293 (1967).

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

In my view, this case is controlled by *United States* v. *Peltier*, 422 U. S. 531 (1975). *Peltier* established two propositions. First, retroactive application of a new constitutional doctrine is appropriate when that doctrine's major purpose is "'to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.'" *Id.*, at 535, quoting *Williams* v. *United States*, 401 U. S. 646, 653 (1971). Second, new extensions of the exclusionary rule do not serve this purpose and, therefore, will not generally be applied retroactively. There was surely nothing extraordinary about our ruling in *Payton* v. *New York*, 445 U. S. 573 (1980), that would justify an exception to this general rule.

Peltier was only the latest of a number of cases involving the question of whether rulings extending the reach of the exclusionary rule should be given retroactive effect. We noted there that "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule . . . the Court has concluded that any such new constitutional principle would be accorded only prospective application." 422 U. S., at 535. We suggested that there were two reasons for this consistent pattern of decisions and that these two reasons were directly related to the justifications for the exclusionary rule.

That rule has traditionally been understood to serve two purposes: first, it preserves "judicial integrity"; second, it acts as a deterrent to unconstitutional police conduct. Neither of these purposes, however, is furthered by retroactive application of new extensions of the rule. First, "if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'impera-

tive of judicial integrity' is not offended by the introduction into evidence of that material." *Id.*, at 537. Second, a deterrence purpose can only be served when the evidence to be suppressed is derived from a search which the law enforcement officers knew or should have known was unconstitutional under the Fourth Amendment. *Id.*, at 542.

In focusing on the purpose of the exclusionary rule in order to decide the question of retroactivity, the Court was following settled principles. In *Linkletter* v. *Walker*, 381 U. S. 618 (1965), which the majority agrees is the first of the modern retroactivity cases, the Court set forth a three-pronged model for analysis of the retroactivity question presented there:

> "[W]e must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*." *Id.*, at 636.

This three-prong analysis was consistently applied in the cases which followed, *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 419 (1966); *Johnson* v. *New Jersey*, 384 U. S. 719, 727 (1966); *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). Indeed, in *Stovall*, the Court specifically announced that these three considerations—purpose of the new rule, reliance on the old rule, and effect on the administration of justice—were generally to guide resolution of all retroactivity problems relating to constitutional rules of criminal procedure. In each of these cases, the purpose of the new rule was the first consideration. That this was not accidental was made absolutely clear in *Desist* v. *United States*, 394 U. S. 244, 249 (1969): "Foremost among these factors is the purpose to be served by the new constitutional rule."* And as we went on

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*See also 394 U. S., at 251: "It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity."

to say there, "[t]his criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule." *Ibid.*

Moreover, up until today's decision it was clear that these same principles governed the question of whether a new decision should retroactively apply to cases pending on appeal at the time of its announcement. *Peltier* itself was just this sort of a case: Peltier's case was on appeal at the time of the announcement of the decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973). Indeed, we reversed the Court of Appeals' holding in that case that the "rule announced . . . in Almeida-Sanchez v. United States . . . should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced." *United States* v. *Peltier*, 500 F. 2d 985, 986 (CA9 1974) (footnote omitted). I had thought that we long ago resolved the problem of the appearance of inequity that arises whenever we limit the retroactive reach of a new principle of law. As JUSTICE BRENNAN stated for the Court in *Stovall*, *supra*, at 301:

> "Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making."

All of these principles are well settled and require reversal of the judgment of the Court of Appeals. The majority, in an intricate and confusing opinion disagrees. Two reasons for its disagreement seem to be presented.

First, the majority discerns no consistent reading of our precedents that would control this case. *Ante*, at 554 ("Having determined that the retroactivity question here is not clearly controlled by our prior precedents . . ."). Given the clarity with which we have previously set out the applicable

principles and the consistent application of those principles in cases involving extensions of the exclusionary rule, this is surely a strange conclusion. Eschewing the straightforward reading of the cases set forth above, which looks primarily to the substantive purpose of the relevant rule of law, the majority replaces it with an exceedingly formal set of three categories. *Ante*, at 549–551. Because these categories turn out to be dicta only, they merit little comment. Suffice it to say that their inadequacy is obvious from even a moment's reflection: That category to which the majority agrees "the Court has regularly given complete retroactive effect" is nowhere included in this formal scheme—cases announcing new constitutional rules whose major purpose "'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.'" *Ante*, at 544, quoting *Williams* v. *United States*, 401 U. S., at 653 (plurality opinion). It is little wonder that the majority finds this case difficult, when it has failed to learn the most obvious lessons of the previous cases.

Second, the majority seems to think that the problems of principle that Justice Harlan struggled with in his dissent in *Desist* v. *United States*, *supra*, are unanswerable under any rule that fails to give the benefits of a new constitutional ruling to all criminal defendants whose cases are pending on appeal at the time of the announcement. These problems are not new and were, I believe, adequately answered by JUSTICE BRENNAN in *Stovall*. The majority's approach, however, does not resolve these theoretical problems; it simply draws what is necessarily an arbitrary line in a somewhat different place than the Court had previously settled upon. Anything less than full retroactivity will necessarily appear unjust in some instances; it will provide different treatment to similarly situated individuals. The majority recognizes that the vagaries of the appellate process will cause this same problem to reappear under its proposed rule: "Even under

our approach, it may be unavoidable that some similarly situated defendants will be treated differently." *Ante*, at 556–557, n. 17. We had previously held that the best way to deal with this problem of inherent arbitrariness was to abide by the substantive principles outlined in *Stovall*. The majority makes no better suggestion today and is fooling itself if it believes that its proposal is a reasoned response to this problem of arbitrariness, rather than an exercise in line-drawing.

The insubstantiality of the majority's analysis and proposal is well illustrated by its conclusion. Despite the appearance of having resolved the difficult problem of the apparent injustice of any rule of partial retroactivity, the Court announces at the end that its decision today applies only to decisions "construing the Fourth Amendment" and asserts that it is not disturbing any of our retroactivity precedents. *Ante*, at 562. That is, it returns from its abstract procedural approach to the substantive rule of law at issue. There are two problems with this, however. First, there is no connection between the analysis and the conclusion. Second, and more important, we already had a perfectly good rule for resolving retroactivity problems involving the Fourth Amendment.

Accordingly, I dissent.

SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HOGAN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 81–213. Argued March 24, 1982—Decided June 21, 1982

Section 1903(f) of the Social Security Act provides that federal reimbursement to States electing to provide Medicaid benefits to the "medically needy" is available only if the income of those persons, after deduction of incurred medical expenses, is less than 133⅓% of the state Aid to Families With Dependent Children (AFDC) payment level. Section 1903(f) specifically excepts from this rule the "categorically needy"—those receiving Supplemental Security Income (SSI) because of lack of income to meet their basic needs. As applied in Massachusetts, § 1903(f) results in a distribution of Medicaid benefits to recipients of SSI that is more generous than the distribution of such benefits to persons who are self-supporting. Appellees, each of whom (or his spouse) receives Social Security benefits in an amount that renders him ineligible for either SSI benefits or state supplementary payments, filed suit in Federal District Court, alleging that § 1903(f), as applied in Massachusetts, violates the equal protection component of the Fifth Amendment. Appellees asserted that, since 133⅓% of the Massachusetts AFDC payment level is for them lower than the SSI payment level, they are ineligible for Medicaid until their income, after deduction of incurred medical expenses, is less than that of SSI payment recipients, and that because of the Social Security benefits which they receive, appellees thus have less income available for nonmedical expenses than individuals who—possibly because they never worked and receive no Social Security benefits—are dependent upon public assistance for support. The District Court entered judgment for appellees.

Held:

1. There is no merit to appellees' contention that the Social Security Act itself compels the conclusion that, if Medicaid services are provided to the "medically needy," those persons may not be forced to incur medical expenses that would reduce their remaining income below the applicable public assistance standard. The legislative history of the Medicaid provisions of the Act does not justify a departure from the literal and clear language of § 1903(f). Nor does § 1903(f)'s literal language conflict with any other provision of the Act. Moreover, adherence to that sec-

tion's language is consistent with its interpretation by the Secretary of Health and Human Services. Thus, the discrimination challenged in this case is required by the Social Security Act. Pp. 584–588.

2. As applied in Massachusetts, § 1903(f) does not violate constitutional principles of equal treatment. While powerful equities support appellees' claim of unfair treatment insofar as they receive less medical assistance and have less income remaining for their nonmedical needs than do SSI recipients, a belief that an Act of Congress may be inequitable or unwise is an insufficient basis on which to conclude that it is unconstitutional. The optional character of the congressional scheme—whereby participating States must provide Medicaid benefits to the categorically needy but may elect not to provide any benefits at all to the medically needy—does not itself violate constitutional principles of equality. Since a State may deny all benefits to the medically needy—while providing benefits to the categorically needy and rendering some persons who are on public assistance better off than others who are not—it may narrow the gap between the two classes by providing partial benefits to the medically needy, even though certain members of that class may remain in a position less fortunate than those on public assistance. The fact that Massachusetts has provided Medicaid benefits to the medically needy does not force it to make immediate medical need the sole standard in its entire Medicaid program. Pp. 588–593.

501 F. Supp. 1129, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

George W. Jones argued the cause *pro hac vice* for appellant. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *William Kanter*, *Bruce G. Forrest*, *Lynne K. Zusman*, and *Robert P. Jaye*.

William H. Simon, by appointment of the Court, 454 U. S. 1051, argued the cause for appellees. With him on the brief were *Mark Coven*, *Gill Deford*, and *Gary Bellow*.*

**Francis X. Bellotti*, Attorney General of Massachusetts, and *Mitchell J. Sikora, Jr.*, and *Paul W. Johnson*, Assistant Attorneys General, filed a brief for the Commonwealth of Massachusetts as *amicus curiae* urging reversal.

Bruce K. Miller and *Dennis Caraher* filed a brief for the Massachusetts Association of Older Americans as *amicus curiae* urging affirmance.

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this case are the meaning and validity of § 1903(f) of the Social Security Act, 81 Stat. 898, as amended, 42 U. S. C. § 1396b(f). As applied in Massachusetts, that provision results in a distribution of Medicaid benefits to recipients of Supplemental Security Income (SSI)—a class of aged, blind, or disabled persons who lack sufficient income to meet their basic needs—that is more generous than the distribution of such benefits to persons who are self-supporting. Appellees are members of the latter class. Because they must incur medical expenses—for which they are never reimbursed—before they become eligible for Medicaid, they have less income available for their nonmedical needs than the recipients of SSI. The District Court concluded that this discrimination was irrational and held that § 1903(f) was unconstitutional. *Hogan* v. *Harris*, 501 F. Supp. 1129 (Mass. 1980). We disagree and reverse.

The statutory provisions governing the Medicaid program are complex. See 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. IV). We first consider the history of the specific provisions at issue in this case, then relate the circumstances that gave rise to the present controversy, and finally address the two legal issues that are presented.

I

Section 1903(f) of the Social Security Act (Act) was enacted in 1968. To understand the present controversy, however, it is necessary to consider amendments to the Act made in 1965, 1967, and 1972.

A

The Medicaid program was established in 1965 in Title XIX of the Act "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U. S. 297, 301. Section 1902(a)(10) of the Act, 42

U. S. C. § 1396a(a)(10), sets forth the basic scope of the program, which has not changed significantly from its enactment in 1965. See 79 Stat. 345. Participating States are required to provide Medicaid coverage to certain individuals—now described as the "categorically needy"; at their option States also may provide coverage (and receive partial federal reimbursement) to other individuals—described as the "medically needy." See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 37.[1] These classes are defined by reference to other federal assistance programs.

In 1965, federal assistance programs existed for the aged, the blind, the disabled, and families with dependent children.[2] At that time, each of these programs was administered by the States, which established both the "standard of need" and the "level of benefits." See *Jefferson* v. *Hackney*, 406 U. S. 535; *Rosado* v. *Wyman*, 397 U. S. 397.[3] In establishing the Medicaid program, Congress required participating States to provide medical assistance to individuals who received cash payments under one of these assistance programs. 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(A). The House Report explained: "These people are the most needy in the country and it is appropriate for

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[1] But see n. 18, *infra*.

[2] These programs were entitled: Old Age Assistance (OAA), 42 U. S. C. § 301 *et seq.* (1970 ed.); Aid to the Blind, § 1201 *et seq.*; Aid to the Permanently and Totally Disabled, § 1351 *et seq.*; and Aid to Families with Dependent Children (AFDC), § 601 *et seq.* See also 42 U. S. C. §§ 1381–1385 (1970 ed.). These programs are of course fundamentally different from Old Age, Survivors, and Disability Insurance (OASDI or Social Security), 42 U. S. C. § 401 *et seq.*

[3] In many States, the "level of benefits" did not raise an individual's income to the "standard of need." The standard of need determined eligibility for *some* benefits; often the benefits provided, however, were merely a fraction of the difference between the individual's income and the defined standard of need. See *Jefferson* v. *Hackney*. The standards of need also typically varied from program to program.

medical care costs to be met, first, for these people."[4] They are the "categorically needy."

Congress also provided that a participating State could offer Medicaid benefits to individuals who fell within one of the categories for which federal assistance was available but whose income made them ineligible for aid under those programs. These individuals were deemed "less needy"[5] and could receive assistance only if their income and resources were insufficient "to meet the costs of necessary medical or remedial care and services." 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(C). In 1965, no limit was placed on the extent to which federal reimbursement was available for optional coverage that States elected to provide to these persons who might become "medically needy."[6]

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[4] H. R. Rep. No. 213, 89th Cong., 1st Sess., 66 (1965) (1965 House Report).

[5] *Ibid.* See also S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 77 (1965) (1965 Senate Report).

[6] The 1965 Act contained certain requirements governing the comparative treatment of different beneficiaries under the Act. It provided that the medical assistance afforded to an individual who qualified under any categorical assistance program could not be different from that afforded to an individual who qualified under any other program. 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(B)(i). In other words, the amount, duration, and scope of medical assistance provided to an individual who qualified to receive assistance for the aged could not be different from the amount, duration, and scope of benefits provided to an individual who qualified to receive assistance for the blind. "This will assure comparable treatment for all of the needy under the federally aided categories of assistance and will eliminate some of the unevenness which has been apparent in the treatment of the medical needs of various groups of the needy." 1965 House Report, at 66. See also 1965 Senate Report, at 77.

A similar "comparability" requirement among the aged, blind, disabled, and dependent applied to the optional distribution of benefits to the "medically needy." If a State elected to provide benefits to one group, it was obligated to provide benefits to the others, and "the determination of financial eligibility must be on a basis that is comparable as among the people who, except for their income and resources, would be recipients of money

Since States established the income limits for the categorical assistance programs, they also established the income limits for the "categorically needy" under the Medicaid program. In addition, participating States established the eligibility standards for the optional coverage provided to the "medically needy." In § 1902(a)(17) of the Act, 42 U. S. C. § 1396a (a)(17), however, Congress set forth certain requirements governing state standards for determining eligibility. In particular, Congress required States to "provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or any other type of remedial care recognized under State law." 79 Stat. 346; see 42 U. S. C. § 1396a(a)(17).[7]

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for maintenance under the other public assistance programs." 1965 House Report, at 67; see also 1965 Senate Report, at 77. 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(C)(i). In addition, the benefits provided to each categorical group of the medically needy were required to be equal in amount, duration, and scope. 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(C)(ii).

In its provision for "comparability among the various categorical groups of needy people," 1965 House Report, at 67, the Act required comparability in the criteria used to determine eligibility for each group. 79 Stat. 346, as amended, 42 U. S. C. § 1396a(a)(17). See also 1965 House Report, at 67; 1965 Senate Report, at 77 ("Although States may set a limitation on income and resources which individuals may hold and be eligible for aid, they must do so by maintaining a comparability among the various categorical groups of needy people"). Finally, the Act provided that the assistance provided to the "medically needy" could not be greater in amount, duration, or scope than the assistance provided to the "categorically needy." 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(B)(ii). "This was included in order to make sure that the most needy in a State receive no less comprehensive care than those who are not as needy." 1965 House Report, at 67; see also 1965 Senate Report, at 77.

[7] In its discussion of this portion of the statute, the 1965 House Report, at 68, explains:

"The bill also contains a provision designed to correct one of the weaknesses identified in the medical assistance for the aged program. Under

Most States promptly elected to participate in the Medicaid program.[8] Many of these States also chose to provide Medicaid coverage to the "medically needy." Within a year, Congress recognized that it was fiscally improvident to rely exclusively on the States to set income limits for both aspects

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the current provisions of Federal law, some States have enacted programs which contain a cutoff point on income which determines the financial eligibility of the individual. Thus, an individual with an income just under the specified limit may qualify for all of the aid provided under the State plan. Individuals, however, whose income exceeds the limitation adopted by the State are found ineligible for the medical assistance provided under the State plan even though the excess of the individual's income may be small when compared with the cost of the medical care needed. In order that all States shall be flexible in the consideration of an individual's income, your committee bill requires that the States standards for determining eligibility for and the extent of medical assistance shall take into account, except to the extent prescribed by the Secretary, the cost—whether in the form of insurance premiums or otherwise—incurred for medical care or any other type of remedial care recognized under State law. Thus, before an individual is found ineligible for all or part of the cost of his medical needs, the State must be sure that the income of the individual has been measured in terms of both the State's allowance for basic maintenance needs and the cost of the medical care he requires."

See also 1965 Senate Report, at 78–79. To this extent, the House Report mirrors the statutory language. In further describing this provision, however, the 1965 House Report, at 68, immediately continues:

"The State may require the use of all the excess income of the individual toward his medical expenses, or some proportion of that amount. In no event, however, with respect to either this provision or that described below with reference to the use of deductibles for certain items of medical service, may a State require the use of income or resources which would bring the individual below the test of eligibility under the State plan. If the test of eligibility should be $2,000 a year, an individual with income in excess of that amount shall not be required to use his income to the extent he has remaining less than $2,000. This action would reduce the individual below the level determined by the State as necessary for his maintenance."

See also 1965 Senate Report, at 79. This additional comment has no direct foundation in the statutory language of § 1902(a)(17). See 42 U. S. C. § 1396a(a)(17).

[8] See H. R. Rep. No. 544, 90th Cong., 1st Sess., 117 (1967) (1967 House Report).

of the Medicaid program. See H. R. Rep. No. 2224, 89th Cong., 2d Sess., 1–3 (1966). It cautioned States "to avoid unrealistic levels of income and resources for title XIX eligibility purposes." *Id.*, at 3.

B

In 1967, Congress placed a limit on federal participation in the Medicaid program. Representative Mills introduced a bill, sponsored by the Johnson administration, that would have made significant changes in both the Medicaid program and the categorical assistance programs. H. R. 5710, 90th Cong., 1st Sess. (1967). Under § 220 of H. R. 5710, a State participating in the Medicaid program would have been entitled to receive federal financial assistance for providing Medicaid benefits only to those persons whose income, after deduction of incurred medical expenses, was less than 150% of the highest of the State's categorical assistance standards of need.[9] Section 202 of the bill would have required States to revise annually the standards of need under each of the categorical assistance programs to reflect changes in the costs of living and, in some circumstances, to pay 100% of the standard of need established under the programs. In support of this provision, the Secretary of the Department of Health, Education, and Welfare explained that "33 States provide less support for needy children [under the AFDC program] than the standards the States themselves have set as necessary to meet basic human needs."[10]

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[9] This provision, of course, would have had no effect on the "categorically needy," since their income was necessarily less than 150% of the highest categorical assistance standard of need.

[10] President's Proposals for Revision in the Social Security System: Hearings on H. R. 5710 before the House Committee on Ways and Means, 90th Cong., 1st Sess., 118 (1967). In January 1965, there were 21 States that paid less than 75% of the standard of need established for a family of four under the State's AFDC program. *Id.*, at 119.

After extensive consideration, the House Ways and Means Committee reported out a substantially revised bill. H. R. 12080, 90th Cong., 1st Sess. (1967). The Committee Report described its primary proposed limitation on federal participation:

> "Your committee is proposing . . . that Federal sharing will not be available for families whose income exceeds 133⅓ percent of the highest amount ordinarily paid to a family of the same size (without any income and resources) in the form of money payments under the AFDC program. (AFDC income limits are, generally speaking, the lowest that are used in the categorical assistance programs)." 1967 House Report, at 119.

As noted, see n. 10, *supra*, the amount of benefits *paid* in many States was less than the qualifying standard of need.[11] The Committee Report explained the reasons for the move to limit federal participation in the Medicaid program. After noting that a few States had provided benefits beyond that anticipated by Congress, it stated:

> "Your committee expected that the State plans submitted under title XIX would afford better medical care and services to persons unable to pay for adequate care.

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[11] The proposed bill also provided another limit on federal participation. It included a provision that set "a figure of 133⅓ percent of the average per capita income of a State as the upper limit on Federal sharing when applied to a family of four under the title XIX program." 1967 House Report, at 119. It is noteworthy that these proposals were not an insignificant part of what was—admittedly—a complex bill. In setting forth at the outset the "principal purposes of the bill," the House Report provides:

"Fifth, to modify the program of medical assistance to establish certain limits on Federal participation in the program and to add flexibility in administration, the bill would—

"(*a*) Impose a limitation on Federal matching at an income level related to payments for families receiving aid to families with dependent children or to the per capita income of the State, if lower." *Id.*, at 5.

> It neither expected nor intended that such care would supplant health insurance presently carried or presently provided under collective bargaining agreements for individuals and families in or close to an average income range. Your committee is also concerned that the operation of some State plans may greatly reduce the incentives for persons aged 65 or over to participate in the supplementary medical insurance program [Medicare] of title XVIII of the Social Security Act, which was also established by the Social Security Amendments of 1965. The provisions of the bill are directed toward eliminating, insofar as Federal sharing is concerned, these clearly unintended and, in your committee's judgment, undesirable actual and potential effects of the legislation." *Id.*, at 118.

In States that paid less than 75% of the AFDC standard of need, the House provision would have provided Medicaid benefits only to persons whose income, after deduction of incurred medical expenses, was less than the AFDC standard of need.[12]

The Committee proposal was severely criticized on the House floor.[13] It nevertheless was passed by the House and

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[12] If the House bill applied to both the categorically needy and the medically needy, it could have resulted in the denial of Medicaid benefits to certain categorically needy individuals who—although eligible for assistance under the State's standard of need—had an income that was higher than 133⅓% of the amount the State actually *paid* to a qualifying individual with no income. The House bill did not, however, alter § 1902(a)(10) of the Act, 42 U. S. C. § 1396a(a)(10), which required participating States to provide Medicaid benefits to all of the categorically needy.

[13] See 113 Cong. Rec. 23065 (1967) (remarks of Rep. King); *id.*, at 23077 (remarks of Rep. Burke); *id.*, at 23082 (remarks of Rep. Vanik); *id.*, at 23084 (remarks of Rep. Bingham); *id.*, at 23087 (remarks of Rep. Halpern); *id.*, at 23093 (remarks of Rep. Ryan); *id.*, at 23104 (remarks of Rep. Bingham); *id.*, at 23125 (remarks of Rep. Boland); *id.*, at 23128 (remarks of Rep. Kastenmeier). In particular, see *id.*, at 23131 (remarks of Rep.

sent to the Senate.[14] The Senate returned a substantially different bill and the matter was referred to conference.[15]

The Conference Committee adopted the House 133⅓%

Farbstein); *id.*, at 23083 (remarks of Rep. Gilbert); *id.*, at 23092 (remarks of Rep. Burton).

[14] Representative Mills defended the bill against criticism that its treatment of those with income above the categorical assistance limit was unfair. He noted that it was "only because of what we walked into with this program that the committee has seen fit to put limits on it," *id.*, at 23093, and added: "I do not think it is fair to tax people through the general funds of the Treasury to pay for the medical costs of those who undoubtedly have the means to buy insurance and to defray their own medical costs." *Ibid.* See also *id.*, at 23061–23062 (remarks of Rep. Byrnes); *id.*, at 23084–23085 (remarks of Rep. Hanley); *id.*, at 23090 (remarks of Rep. Stratton); *id.*, at 23090, 23091 (remarks of Rep. McCarthy); *id.*, at 23105 (remarks of Rep. Taft); *id.*, at 22783 (remarks of Rep. Quillen).

[15] In hearings before the Senate Finance Committee, an HEW official recommended that the administration's proposal be adopted. He criticized the House bill and noted that, in States such as Indiana and Texas, 133% of the AFDC payment amount was less than the AFDC standard of need. Social Security Amendments of 1967: Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., 280 (1967). He pointed out that such a standard could result in exclusion of some of the categorically needy, which he suggested probably had not been intended. *Ibid.* Senator Robert Kennedy also criticized the House proposal, noting that medically needy individuals would not be eligible for Medicaid in some States until their income, after deduction of incurred medical expenses, was less than the standards of need established for the categorically needy. *Id.*, at 784.

The Finance Committee subsequently proposed a bill that provided participating States with federal assistance for Medicaid expenditures made on behalf of any person whose income after the deduction of medical expenses was less than 150% of the OAA standard, which generally was the highest of the cash assistance standards. See S. Rep. No. 744, 90th Cong., 1st Sess., 177 (1967). The Senate bill also introduced a new formula for computing the amount of federal reimbursement under the Medicaid program that was designed to reduce federal matching funds for payments to the medically needy. *Id.*, at 176–177.

The proposals encountered resistance on the Senate floor. Senator Javits, speaking in support of an amendment offered by Senator Kuchel that

AFDC payment standard. H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., 63 (1967). It added, however, an express exception for the categorically needy. *Ibid.* Opposition to the Conference proposal was voiced in both the House and the Senate.[16] The 133⅓% AFDC payment standard nevertheless was approved by Congress and enacted into law as § 1903(f) of the Social Security Act. See 81 Stat. 898, as amended, 42 U. S. C. § 1396b(f).[17]

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would have substituted the proposals of the administration, criticized the Finance Committee bill on the ground that it discriminated against the medically needy. See 113 Cong. Rec. 33168, 33169 (1967). In response, Senator Long acknowledged that the bill discriminated against the medically needy, but explained that it "encourages the State to concentrate its medical assistance for those who are most in need, those who qualify for public welfare assistance." *Id.*, at 33169, 33171. The Senate rejected the Kuchel amendment and adopted the Finance Committee bill.

[16] See *id.*, at 36380 (remarks of Rep. Burton); *id.*, at 36381 (remarks of Rep. Gilbert); *id.*, at 36385 (remarks of Rep. Reid); *id.*, at 36387 (remarks of Rep. Ryan); *id.*, at 36389 (remarks of Rep. Farbstein). In the Senate, Robert Kennedy complained that in Mississippi the 133⅓% limitation amounted to an income level, after medical expenses had been incurred, of $80 per month for a family of four. *Id.*, at 36784. Senator Mondale quoted the testimony in the Senate Hearings, see n. 15, *supra*, that in some States the 133⅓% AFDC payment amount was less than the standard of need established under even the AFDC program. 113 Cong. Rec. 36819 (1967).

[17] Title 42 U. S. C. § 1396b(f) provides:

"(f) Limitation on Federal participation in medical assistance

"(1)(A) Except as provided in paragraph (4), payment under the preceding provisions of this section shall not be made with respect to any amount expended as medical assistance in a calendar quarter, in any State, for any member of a family the annual income of which exceeds the applicable income limitation determined under this paragraph.

"(B)(i) Except as provided in clause (ii) of this subparagraph, the applicable income limitation with respect to any family is the amount determined, in accordance with standards prescribed by the Secretary, to be equivalent to 133⅓ percent of the highest amount which would ordinarily be paid to a family of the same size without any income or resources, in the form of money payments, under the plan of the State approved under Part A of subchapter IV of this chapter.

C

In 1972, Congress replaced three of the four state-administered categorical assistance programs with a new federal program entitled Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 42 U. S. C. § 1381 *et seq.* (1976 ed. and Supp. IV).[18] The SSI program establishes a federally

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"(2) In computing a family's income for purposes of paragraph (1), there shall be excluded any costs (whether in the form of insurance premiums or otherwise) incurred by such family for medical care or for any other type of remedial care recognized under State law.

. . . . .

"(4) The limitations on payment imposed by the preceding provisions of this subsection shall not apply with respect to any amount expended by a State as medical assistance for any individual—

"(A) who is receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV or XVI, or part A of subchapter IV, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, or

"(B) who is not receiving such aid or assistance, and with respect to whom such benefits are not being paid, but (i) is eligible to receive such aid or assistance, or to have such benefits paid with respect to him, or (ii) would be eligible to receive such aid or assistance, or to have such benefits paid with respect to him if he were not in a medical institution, or

"(C) with respect to whom there is being paid, or who is eligible, or would be eligible if he were not in a medical institution, to have paid with respect to him, a State supplementary payment and is eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1396a(a)(10)(A) of this title, but only if the income of such individual (as determined under section 1382a of this title, but without regard to subsection (b) thereof) does not exceed 300 percent of the supplemental security income benefit rate established by section 1382(b)(1) of this title,

at the time of the provision of the medical assistance giving rise to such expenditure."

[18] The SSI program is funded and administered by the Federal Government. As its name indicates, it replaced the categorical assistance programs for the aged, the blind, and the disabled. The AFDC program continues to be administered by the States and is only partially funded by the Federal Government.

In some States the number of individuals eligible for SSI was significantly greater than the number of persons who had been eligible under the

guaranteed minimum income for the aged, blind, and disabled. See *Schweiker* v. *Wilson*, 450 U. S. 221, 223. Under the program, however, the States may (and in some cases must) raise that minimum standard and supplement the benefits provided by the Federal Government. See 42 U. S. C. § 1382e (1976 ed. and Supp. IV). Moreover, if supplemental payments are made to persons who would be eligible for SSI benefits except for the amount of their income, the State also may provide Medicaid benefits to those persons. See 42 U. S. C. § 1396a(a)(10)(C)(ii).[19]

II

The Commonwealth of Massachusetts has chosen to participate in the Medicaid program and to provide benefits—to the extent that federal financial assistance is available—to the "medically needy." The State also has elected to make supplementary payments to individuals who are eligible for SSI benefits or who would be eligible except for their income. Finally, the State has chosen to provide Medicaid benefits to those persons who receive supplemental payments. In Massachusetts, 133⅓% of the appropriate state AFDC

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state-administered categorical assistance programs. See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 38. Since recipients of categorical welfare assistance are also entitled to Medicaid benefits, the expansion of general welfare accomplished by the SSI program increased Medicaid obligations for some States. To guarantee that States would not, for that reason, withdraw from the Medicaid program, Congress offered what has become known as the "§ 209(b) option." Under it, States may elect to provide Medicaid assistance only to those individuals who would have been eligible under the state Medicaid plan in effect on January 1, 1972. See *id.*, at 38–39. Thus, in some States, Medicaid is not automatically available for all of the "categorically needy." Massachusetts is not a § 209(b) State.

[19] There is a limit on federal participation in this aspect of the program. A State is entitled to federal financial assistance for providing Medicaid benefits to a state supplementary payment recipient only if his gross income is less than 300% of the applicable SSI income limitation. See 42 U. S. C. § 1396b(f)(4)(C); n. 17, *supra*.

payment amount is less in some cases than the combined federal SSI and state supplementary payment level.[20]

Appellees filed this suit in 1980 in federal court, contending that § 1903(f) of the Act—as applied in Massachusetts—violates the equal protection component of the Fifth Amendment.[21] Each of the appellees is either aged, blind, or disabled, but they are not categorically needy. For each appellee or his spouse was employed at one time and paid "Social Security" taxes. Each appellee (or his spouse) currently receives Social Security benefits (Federal Old-Age, Survivors, and Disability Insurance, 42 U. S. C. § 401 *et seq.* (1976 ed. and Supp. IV)) in an amount that renders him ineligible for either SSI benefits or state supplementary payments. Appellees challenged the fact that, since 133⅓% of the Massachusetts AFDC payment level is for them lower than the SSI payment level, they are ineligible for Medicaid until their income, after deduction of incurred medical expenses, is less than that of SSI payment recipients. By reason of the Social Security benefits that they receive, appellees thus have less income available for nonmedical expenses than individuals who—possibly because they never worked and receive no Social Security benefits—are dependent upon public assistance for support.[22]

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[20] There is no statutory requirement that state AFDC payment amounts be comparable to state supplemental benefits.

[21] See *Bolling* v. *Sharpe*, 347 U. S. 497, 499. Appellees also contended that certain state statutory provisions violated the Equal Protection Clause of the Fourteenth Amendment.

[22] Appellees alleged that federal and state provisions require an individual to apply for and to accept all Social Security benefits for which he is eligible as a condition of application for SSI and Medicaid benefits. See 42 U. S. C. § 1382(e)(2).

Appellees' grievances are best illustrated by the situation of appellee Hunter. The District Court found that Hunter had worked for 41 years and had paid Social Security taxes during that period. As a result, he received at the time of trial $534 per month in Social Security benefits, $20 of which apparently was disregarded in computing eligibility for SSI and state supplementary payments. As a result of his income, Hunter was in-

The District Court granted appellees' motion for partial summary judgment.[23] It ruled that the Massachusetts Medicaid program was unconstitutional insofar as it forced Social Security recipients to incur medical expenses that reduced their remaining income to an amount below SSI payment levels. The court later declared explicitly that § 1903(f) of the Act, 42 U. S. C. § 1396b(f), is unconstitutional as applied in Massachusetts. App. to Juris. Statement 25a. We noted probable jurisdiction. 454 U. S. 891.

III

In this Court, for the first time, appellees contend that the Social Security Act itself compels the conclusion that, if Medicaid services are provided to the "medically needy," those persons may not be forced to incur medical expenses that

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eligible for either SSI or state supplemental payments; the "standard of need" under those programs was $513 per month. If he had qualified, he of course would also have been eligible for Medicaid. Since the applicable AFDC payment amount in Massachusetts was $300, Hunter was ineligible for Medicaid until his income, after deduction of incurred medical expenses, was no higher than $400. Hunter regularly incurred over $200 each month in medical expenses; thus, by reason of his Social Security benefits, he had less income available for nonmedical needs ($400 per month) than he would have had on public assistance ($513 per month). In his case, a Social Security payment of $1 less each month ($534 less $20 less $1) would apparently have rendered him fully eligible for Medicaid. See *Hogan* v. *Harris*, 501 F. Supp. 1129, 1132 (Mass. 1980). In other words, if his gross income were reduced by $1, he would receive over $100 in additional medical benefits and have that additional amount of income available for nonmedical needs.

[23] The District Court certified a class "consisting of all (i) present and future Social Security recipients; (ii) who reside or will reside in Massachusetts; (iii) who are or will be disabled or 65 years old or older; (iv) who are or will be ineligible because of the amount of their incomes for Massachusetts Supplemental Security Income payments; and (v) who have or will have, as determined in accordance with the applicable Massachusetts Medicaid regulations, medical expenses not subject to payment by a third party which exceed the difference between their countable incomes under the Massachusetts Medicaid regulations and the applicable Massachusetts Supplemental Security Income standard." App. to Juris. Statement 23a–24a.

would reduce their remaining income below the applicable public assistance standard. Although appellees did not advance this argument in the District Court, they are not precluded from asserting it as a basis on which to affirm that court's judgment.[24] "Where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily we first address the statutory argument in order to avoid unnecessary resolution of the constitutional issue." *Blum* v. *Bacon*, *ante*, at 137. See *Harris* v. *McRae*, 448 U. S., at 306–307.

Appellees contend that a "fundamental Congressional purpose in the creation of the medically needy feature of Title XIX was to achieve equity between public assistance recipients and others similarly situated." Brief for Appellees 12. In support of this contention, appellees cite the requirement first imposed in 1965 that States "include reasonable standards *(which shall be comparable for all groups)* for determining eligibility for and the extent of medical assistance under the plan . . . ," 79 Stat. 346 (emphasis added), as amended, 42 U. S. C. § 1396a(a)(17), and note the statements in the legislative history that a State could not require an individual to use, for medical expenses, income "which would bring the individual below the test of eligibility under the State plan." See n. 7, *supra*.

Moreover, appellees contend that this "comparability requirement" was not changed by the enactment of § 1903(f) in 1968. Appellees argue that the separate bills passed in both the House and the Senate would have affected *both* the categorically and the medically needy.[25] Only when the Confer-

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[24] "It is well accepted . . . that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum* v. *Bacon*, *ante*, at 137, n. 5. The statutory argument raised by the appellees, although not presented in the District Court, may be decided on the basis of the record developed in that court.

[25] See n. 12, *supra*. Since the limitation in the Senate bill was set at 150% of the OAA assistance standard, by definition it would not likely have

ence Committee accepted the House provision and added an exception for the categorically needy, appellees argue, did the 1968 modification potentially change the comparability requirement between the two groups. Appellees assert that such a change was not intended; rather, they argue that the exception for the categorically needy was added only to ensure that they would not be adversely affected by § 1903(f). Appellees assert that the medically needy were not similarly excepted from the 133⅓% rule in those States in which that figure was less than the applicable standard of need because, in 1967, those States did not have medically needy programs.

Thus, appellees urge that we construe § 1903(f) to require the medically needy to incur medical expenses until their income is 133⅓% of the AFDC payment amount or—to maintain comparability—100% of the combined SSI-state supplementary payment level *if that figure is higher*. Appellees argue that the legislative history of the 1965 and 1967 Amendments to the Social Security Act justifies a departure from the literal language of § 1903(f) and the Secretary's interpretation of that provision.

We cannot agree. Congress explicitly stated in § 1903(f) that federal reimbursement for benefits provided to the medically needy was available only if the income of those persons, after the deduction of incurred medical expenses, was less than 133⅓% of the state AFDC payment level. In specifically excepting the categorically needy from this rule, Congress recognized that this amount could be lower than categorical assistance eligibility levels. There is no basis in either the statute or the legislative history for appellees' argument that Congress implicitly "assumed" that those States in which 133⅓% of the AFDC payment level was less than the applicable standard of need simply would not provide assistance to the medically needy. Even if this were

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affected the categorically needy. In any event, appellees contend that both bills were consistent with a comparability requirement.

true in 1967, the Medicaid program then was less than two years old; Congress was aware that many States were in the process of adopting Medicaid programs.[26] To assume that Congress was unaware that § 1903(f)—which applied only to the medically needy—could operate in those States—which Congress knew existed—in which 133⅓% of the AFDC payment amount was less than the applicable standard of need is to demean the intelligence of the Congress. We are not prepared to interpret a statute on the basis of an unsupported assumption that Congress had little idea of what it was doing.[27]

The literal and clear language of § 1903(f) does not conflict with any other provision of the Act. In both § 1902(a)(10) and § 1902(a)(17), see 79 Stat. 345–346, Congress required comparability among the various "categories" for which federal assistance was available, but these provisions did not require that the medically needy be treated comparably to the categorically needy in all respects. See n. 6, *supra*.[28] In-

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[26] See 1967 House Report, at 117–118.

[27] Moreover, appellees' "congressional ignorance" argument rests on another unsupportable premise. Appellees assume that the House bill—which they admit was vigorously debated—had a "comparable" effect on the categorically and the medically needy. That bill, however, did not propose an amendment to § 1902(a)(10) of the Act, 42 U. S. C. § 1396a (a)(10), which required that Medicaid coverage be provided to *all* the categorically needy. It is much more likely—in light of § 1902(a)(10)—that the House assumed that its proposed limits on federal participation in the Medicaid program would affect only the medically needy. See Hearings on H. R. 12080, *supra* n. 15, at 280 (describing the possibility that the House bill would affect the categorically needy as a "drafting error"). This assumption was made explicit by the Conference Committee, which chose the House standard but added—with little discussion—a direct exception for the categorically needy.

[28] Relying on 42 U. S. C. §§ 1396a(a)(10)(C)(i) and 1396a(a)(17), courts have concluded that certain treatment of the medically needy must be comparable to that afforded to the categorically needy. See *Caldwell* v. *Blum*, 621 F. 2d 491 (CA2 1980), cert. denied, 452 U. S. 909; *Fabula* v. *Buck*, 598 F. 2d 869 (CA4 1979); *Greklek* v. *Toia*, 565 F. 2d 1259 (CA2 1977), cert. denied *sub nom. Blum* v. *Toomey*, 436 U. S. 962; *Aitchison*

deed, such a broad comparability requirement would be inconsistent with the fact that Congress provided in 1965 that the medically needy could be excluded entirely from the Medicaid program. Moreover, § 1903(f) is not inconsistent with the congressional intent, see n. 7, *supra*, that medical expenses be considered in determining, where appropriate, an individual's eligibility for Medicaid. In § 1903(f) Congress determined that federal assistance would not be available for payments made to individuals whose income, after deduction of incurred medical expenses, was greater than 133⅓% of applicable state AFDC payments. Congress determined that, so long as an individual retained that level of income to meet basic needs, he need not receive reimbursement for medical expenses. That income level might appear unreasonably low, but it is the level that Congress chose. We find no inconsistency between § 1903(f) and § 1902(a)(17).

In sum, we see no reason to ignore the literal language of § 1903(f). Moreover, this analysis is consistent with the Secretary's interpretation of that statutory provision. "We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum* v. *Bacon*, *ante*, at 141. We hold that the discrimination challenged in this case is required by the Social Security Act.

IV

Appellees also contend—and the District Court held—that § 1903(f), as applied in Massachusetts, irrationally discriminates between the categorically and the medically needy.[29]

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v. *Berger*, 404 F. Supp. 1137 (SDNY 1975), aff'd, 538 F. 2d 307 (CA2 1976), cert. denied, 429 U. S. 890. Whatever the scope of the requirement of comparability between the categorically and the medically needy, it is clear that the Act does not require the income of medically needy persons—after the deduction of incurred medical expenses—to be at least comparable to that of the categorically needy.

[29] The discriminatory impact challenged in this case arises solely from the fact that Massachusetts has chosen to supplement SSI payments to an extent that exceeds 133⅓% of state AFDC payment levels. It is not

The unfairness of the statute stems from the fact that appellees receive less medical assistance, and have less income remaining for their nonmedical needs, than do SSI recipients. The unfairness is accentuated by the fact that the disfavored class consists largely of persons who worked and paid taxes to provide for their retirement while the favored class includes persons who may never have done so. Powerful equities unquestionably support the appellees' claim of unfair treatment.

A belief that an Act of Congress may be inequitable or unwise is of course an insufficient basis on which to conclude that it is unconstitutional. Moreover, the validity of a broad legislative classification is not properly judged by focusing solely on the portion of the disfavored class that is affected most harshly by its terms. *Califano* v. *Jobst*, 434 U. S. 47. In this case, Congress has differentiated between the categorically needy—a class of aged, blind, disabled, or dependent persons who have very little income—and other persons with similar characteristics who are self-supporting. Members of the former class are automatically entitled to Medicaid; members of the latter class are not eligible unless a State elects to provide benefits to the medically needy and unless their income, after consideration of medical expenses, is below state standards of eligibility.[30]

According to the congressional scheme, then, the medically needy may be excluded entirely from the Medicaid program. Before considering the constitutional constraints that may exist if a State chooses to provide benefits to that class, it is appropriate to confront the more basic question whether the

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disputed that 133⅓% of the Massachusetts AFDC payment level is higher than federal SSI benefit levels. See 45 Fed. Reg. 31782 (1980); 46 Fed. Reg. 27076 (1981).

[30] Although the arguments in this case have focused on two classes, in fact there are three: (1) the categorically needy; and (2) all others, (a) some of whom have medical expenses that reduce their remaining income to a level that qualifies them as medically needy, and (b) some of whom are neither categorically needy nor medically needy.

optional character of the program for the medically needy is itself constitutionally permissible.

In establishing public assistance programs, Congress often has determined that the Federal Government cannot finance a program that provides meaningful benefits in equal measure to everyone. Both federal and state funds available for such assistance are limited. In structuring the Medicaid program, Congress chose to direct those limited funds to persons who were most impoverished and who—because of their physical characteristics—were often least able to overcome the effects of poverty. The legislative history of the 1965 Amendments makes clear that this group was not chosen for administrative convenience. "These people are the most needy in the country and it is appropriate for medical care costs to be met, first, for these people."[31] A decision to allocate medical assistance benefits only to the poor does not itself violate constitutional principles of equality; in terms of their ability to provide for essential medical services, the wealthy and the poor are not similarly situated and need not be treated the same. It is rational to distribute public assistance benefits on the basis of the income and resources available to potential recipients.

In choosing to require coverage only for the categorically needy, Congress permitted States to exclude from the program many persons who—by reason of large medical expenses—often were just as much in need of medical assistance as the categorically needy. Yet Congress found these persons "less needy." 1965 House Report, at 66. By reason of the greater income available to them, as a class these persons generally are better able to provide for their medical needs. In the legislative history of the 1967 Amendments, see *supra*, at 577–580, and n. 14, Congress noted that these persons often are able to prepare for future medical expenses

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[31] 1965 House Report, at 66.

through private insurance or through participation in the Medicare program.

In *Fullington* v. *Shea*, 404 U. S. 963, this Court affirmed a decision of a three-judge District Court holding that it was constitutional for the State of Colorado to provide benefits to the categorically needy but not to the medically needy. We decided *Fullington* summarily. It is clear that a decision to allocate scarce assistance benefits on the basis of an assumption that persons with greater incomes generally are better able to prepare for future medical needs is not inconsistent with constitutional principles of equal treatment. In other words, it is rational to define need on the basis of income, even though some persons with greater income—who have been unable or unwilling to save enough of their earnings to prepare for future medical needs—may actually be in greater need of assistance than those with less gross income. Although some "medically needy" persons have less income available for nonmedical expenses than those who receive categorical assistance, the broad legislative classification does not involve the type of arbitrariness that is constitutionally offensive.[32]

Appellees do not challenge the decision in *Fullington*. They do not contend that it is irrational to deny benefits entirely to the medically needy. Thus, they do not challenge the line drawn by Congress to separate the class that receives favored treatment from the class that does not. Appellees attack only the manner in which one of the separate

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[32] See *Schweiker* v. *Wilson*, 450 U. S. 221, 238 ("This Court has granted a 'strong presumption of constitutionality' to legislation conferring monetary benefits, *Mathews* v. *De Castro*, 429 U. S., at 185, because it believes that Congress should have discretion in deciding how to expend necessarily limited resources"). The fact that the recipient of a governmental benefit—such as an indigent defendant who is represented by a public defender—may in some cases be better off after receiving the benefit than a wealthier person who did not qualify to receive it does not undermine the validity of the basis for determining eligibility.

classes is affected by the program. They argue that if medical benefits are made available to a class of persons who are not categorically needy, it is constitutionally impermissible to deny them benefits if their income, after the deduction of incurred medical expenses, is lower than that of an individual who receives public assistance.

In view of the unchallenged decision in *Fullington*, appellees' constitutional argument is self-defeating. The injury that they regard as inconsistent with constitutional principles of equal treatment could be avoided by denying them *all* Medicaid benefits, thus placing them in a worse position financially than they are in now. No interest in "equality" could be furthered by such a result. If a State may deny all benefits to the medically needy—while providing benefits to the categorically needy and rendering some persons who are on public assistance better off than others who are not—a State surely may narrow the gap between the two classes by providing partial benefits to the medically needy, even though certain members of that class may remain in a position less fortunate than those on public assistance.

The validity of the distinction between the categorically needy and the medically needy is not undermined by § 1903(f), because the impact of that provision falls entirely on persons who are not within the categorically needy class. See n. 30, *supra*. The function of the 133⅓% AFDC payment rule is to place a limit on the availability of reimbursement for potential members of the "medically needy" class. That rule prevents some persons (although not the appellees) from qualifying as medically needy; it also determines the extent to which the medically needy are reimbursed for their medical expenses. Yet appellees do not challenge the fact that, among persons who do not receive public assistance, some are treated differently from others. In other words, they do not complain of any discrimination within the class (all persons who are not categorically needy)

in which the rule performs its entire function.[33] Nor do they argue that Congress chose an eligibility level that is unrelated to ability to provide for medical needs.

The fact that Massachusetts, unlike the State of Colorado in *Fullington*, has provided Medicaid benefits to the medically needy—and in doing so has defined eligibility for persons who are not categorically needy on the basis of incurred medical expenses—does not force it to make immediate medical need the sole standard in its entire Medicaid program. Massachusetts in essence has determined that those individuals whose gross income is greater than public assistance levels are ineligible for Medicaid, *unless medical expenses in any computation period reduce available income to 133⅓% of the state AFDC payment level.* By adding the qualifying clause, which the State of Colorado did not, Massachusetts did not offend any constitutional interest in equality. Accordingly, without endorsing the wisdom of the particular standard that Congress selected—a matter that is not for us to consider—we conclude that it violates no constitutional command. The judgment of the District Court is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[33] The fact that the amount of benefits payable to persons within the medically needy class is determined on the basis of income remaining *after* medical expenses have been incurred does not impeach the rationality of defining the basic distinction between the categorically needy and all others on the basis of income *before* medical expenses are considered.

SCHMIDT ET AL., DBA SCHMIDT & POLLARD *v.* OAKLAND UNIFIED SCHOOL DISTRICT ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81–1444. Decided June 21, 1982

Held: In affirming the District Court's judgment upholding the constitutionality of the Oakland School District's affirmative-action plan requiring that in order to be considered "responsible" bidders, eligible to be awarded certain School District contracts, general contractors must use minority-owned businesses for at least 25 percent of the total bid, the Court of Appeals abused its discretion in declining to resolve a pendent state-law claim that the affirmative-action plan was invalid under California law. If the plan was invalid under state law, the Court of Appeals need not have reached the federal constitutional claim.

Certiorari granted; 662 F. 2d 550, vacated and remanded.

PER CURIAM.

California Educ. Code Ann. § 39640 (West Supp. 1982) requires school districts to award any contracts for work involving more than $12,000 to the "lowest responsible bidder." For projects over $100,000, the Oakland School District requires that to be considered responsible, general contractors must use minority-owned businesses for at least 25 percent of the dollar amount of the total bid. Petitioners submitted the low bid for an advertised project but were disqualified under the School District plan as not being responsible. They brought this action claiming damages and asserting that the affirmative-action plan violated not only the Federal Constitution but also state law. The Court of Appeals affirmed a judgment of the District Court upholding the plan on constitutional grounds. 662 F. 2d 550 (1981). Although the Court of Appeals acknowledged that under one of its prior decisions, the plan at issue might be invalid under state law, it declined to decide the state-law question since it was a sen-

sitive matter and petitioners could present it to the state courts.

If the affirmative-action plan is invalid under state law, the Court of Appeals need not have reached the federal constitutional issue. Nevertheless, the Court of Appeals declined to resolve the pendent state-law claim. Under *Hagans* v. *Lavine*, 415 U. S. 528, 546 (1974), and *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), this was an abuse of discretion in the circumstances of this case.

We accordingly grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

So ordered.

GLOBE NEWSPAPER CO. *v.* SUPERIOR COURT FOR THE COUNTY OF NORFOLK

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 81–611. Argued March 29, 1982—Decided June 23, 1982

Appellee Massachusetts trial court, relying on a Massachusetts statute providing for exclusion of the general public from trials of specified sexual offenses involving a victim under the age of 18, ordered the exclusion of the press and public from the courtroom during the trial of a defendant charged with rape of three minor girls. Appellant newspaper publisher challenged the exclusion order, and ultimately, after the trial had resulted in the defendant's acquittal, the Massachusetts Supreme Judicial Court construed the Massachusetts statute as requiring, under all circumstances, the exclusion of the press and public during the testimony of a minor victim in a sex-offense trial.

Held:

1. The fact that the exclusion order expired with completion of the trial at which the defendant was acquitted does not render the controversy moot within the meaning of Art. III. The controversy is "capable of repetition, yet evading review," since it can reasonably be assumed that appellant will someday be subjected to another order relying on the Massachusetts statute and since criminal trials are typically of short duration. Pp. 602–603.

2. The Massachusetts statute, as construed by the Massachusetts Supreme Judicial Court, violates the First Amendment as applied to the States through the Fourteenth Amendment. Pp. 603–607.

(a) To the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that the constitutionally protected "discussion of governmental affairs" is an informed one. The right of access to *criminal trials* in particular is properly afforded protection by the First Amendment both because such trials have historically been open to the press and public and because such right of access plays a particularly significant role in the functioning of the judicial process and the government as a whole. Pp. 603–606.

(b) The right of access to criminal trials is not absolute, but the circumstances under which the press and public can be barred are limited. The State must show that denial of such right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. Pp. 606–607.

3. The Massachusetts statute cannot be justified on the basis of either the State's interest in protecting minor victims of sex crimes from further trauma and embarrassment or its interest in encouraging such victims to come forward and testify in a truthful and credible manner. Pp. 607–610.

(a) Compelling as the first interest is, it does not justify a *mandatory* closure rule. Such interest could be just as well served by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the minor victim's well-being necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest. Pp. 607–609.

(b) The second asserted interest is not only speculative in empirical terms but is also open to serious question as a matter of logic and common sense. Although the statute was construed to bar the press and public from the courtroom during a minor sex victim's testimony, the press is not denied access to the transcript, court personnel, or any other source that could provide an account of such testimony, and thus the statute cannot prevent the press from publicizing the substance of that testimony, as well as the victim's identity. Pp. 609–610.

383 Mass. 838, 423 N. E. 2d 773, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 611. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 612. STEVENS, J., filed a dissenting opinion, *post*, p. 620.

James F. McHugh argued the cause and filed briefs for appellant.

Mitchell J. Sikora, Jr., Assistant Attorney General of Massachusetts, argued the cause for appellee. With him on the brief were *Francis X. Bellotti*, Attorney General, and *Gerald J. Caruso* and *Alan B. Sherr*, Assistant Attorneys General.*

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*Briefs of *amici curiae* urging reversal were filed by *Carl R. Ramey, J. Roger Wollenberg, Timothy B. Dyk, Ralph E. Goldberg, Erwin G. Krasnow, J. Laurent Scharff*, and *Carol D. Weisman* for American Broadcasting Cos., Inc., et al.; by *James D. Spaniolo, Gary G. Gerlach, Robert C. Lobdell, A. Daniel Feldman, Robert Sack, P. Cameron Devore, Andrew L. Hughes, Samuel E. Klein, Alan E. Peterson, Bruce W. Sanford,*

JUSTICE BRENNAN delivered the opinion of the Court.

Section 16A of Chapter 278 of the Massachusetts General Laws,[1] as construed by the Massachusetts Supreme Judicial Court, requires trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim. The question presented is whether the statute thus construed violates the First Amendment as applied to the States through the Fourteenth Amendment.

I

The case began when appellant, Globe Newspaper Co. (Globe), unsuccessfully attempted to gain access to a rape trial conducted in the Superior Court for the County of Norfolk, Commonwealth of Massachusetts. The criminal defendant in that trial had been charged with the forcible rape and forced unnatural rape of three girls who were minors at the time of trial—two 16 years of age and one 17. In April 1979, during hearings on several preliminary motions, the trial judge ordered the courtroom closed.[2] Before the trial

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J. Laurent Scharff, W. Terry Maguire, Richard M. Schmidt, Jr., Arthur Sackler, Peter C. Gould, Theodore Sherbow, Alexander Wellford, James F. Henderson, David M. Olive, Conrad M. Shumadine, and *Lawrence Gunnels* for the Miami Herald Publishing Co. et al.; by *Howard Monderer* for the National Broadcasting Co., Inc.; and by *E. Barrett Prettyman, Jr.,* for the Reporters Committee for Freedom of the Press.

[1] Massachusetts Gen. Laws Ann., ch. 278, § 16A (West 1981), provides in pertinent part:

"At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case."

[2] "The court caused a sign marked 'closed' to be placed on the courtroom door, and court personnel turned away people seeking entry." *Globe Newspaper Co.* v. *Superior Court,* 379 Mass. 846, 848, 401 N. E. 2d 360, 362–363 (1980) (footnote omitted).

began, Globe moved that the court revoke this closure order, hold hearings on any future such orders, and permit appellant to intervene "for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions." App. 12a–14a. The trial court denied Globe's motions,[3] relying on Mass. Gen. Laws Ann., ch. 278, § 16A (West 1981), and ordered the exclusion of the press and general public from the courtroom during the trial. The defendant immediately objected to that exclusion order, and the prosecution stated for purposes of the record that the order was issued on the court's "own motion and not at the request of the Commonwealth." App. 18a.

Within hours after the court had issued its exclusion order, Globe sought injunctive relief from a justice of the Supreme Judicial Court of Massachusetts.[4] The next day the justice conducted a hearing, at which the Commonwealth, "on behalf of the victims," waived "whatever rights it [might] have [had] to exclude the press." *Id.*, at 28a.[5] Nevertheless,

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[3] The court refused to permit Globe to file its motion to intervene and explicitly stated that it would not act on Globe's other motions. App. 17a–18a.

[4] Globe's request was contained in a petition for extraordinary relief filed pursuant to Mass. Gen. Laws Ann., ch. 211, § 3 (West 1958 and Supp. 1982–1983).

[5] The Commonwealth's representative stated:

"[O]ur position before the trial judge [was], and it is before this Court, that in some circumstances a trial judge, where the defendant is asserting his right to a constitutional, public trial, . . . may consider that as outweighing the otherwise legitimate statutory interests, particularly where the Commonwealth [acts] on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press." App. 28a.

Some time after the trial began, the prosecuting attorney informed the judge at a lobby conference that she had "spoke[n] with each of the victims regarding . . . excluding the press." *Id.*, at 48a. The prosecuting attorney indicated that the victims had expressed some "privacy concerns" that were based on "their own privacy interests, as well as the fact that there

Globe's request for relief was denied. Before Globe appealed to the full court, the rape trial proceeded and the defendant was acquitted.

Nine months after the conclusion of the criminal trial, the Supreme Judicial Court issued its judgment, dismissing Globe's appeal. Although the court held that the case was rendered moot by completion of the trial, it nevertheless stated that it would proceed to the merits, because the issues raised by Globe were "significant and troublesome, and . . . 'capable of repetition yet evading review.'" *Globe Newspaper Co.* v. *Superior Court*, 379 Mass. 846, 848, 401 N. E. 2d 360, 362 (1980), quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). As a statutory matter, the court agreed with Globe that § 16A did not require the exclusion of the press from the entire criminal trial. The provision was designed, the court determined, "to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial." 379 Mass., at 860, 401 N. E. 2d, at 369. Relying on these twin purposes, the court concluded that § 16A *required* the closure of sex-offense trials only during the testimony of minor victims; during other portions of such trials, closure was "a matter within the judge's sound discretion." *Id.*, at 864, 401 N. E. 2d, at 371. The court did not pass on Globe's contentions that it had a right to attend the entire

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are grandparents involved with a couple of these victims." *Ibid.* But according to the prosecuting attorney, the victims "wouldn't object to the press being included" if "it were at all possible to obtain a guarantee" that the press would not attempt to interview them or publish their names, photographs, or any personal information. *Ibid.* In fact, their names were already part of the public record. See 383 Mass. 838, 849, 423 N. E. 2d 773, 780 (1981). It is not clear from the record, however, whether or not the victims were aware of this fact at the time of their discussions with the prosecuting attorney.

criminal trial under the First and Sixth Amendments, noting that it would await this Court's decision—then pending—in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980).[6]

Globe then appealed to this Court. Following our decision in *Richmond Newspapers*, we vacated the judgment of the Supreme Judicial Court, and remanded the case for further consideration in light of that decision. *Globe Newspaper Co.* v. *Superior Court*, 449 U. S. 894 (1980).

On remand, the Supreme Judicial Court, adhering to its earlier construction of § 16A, considered whether our decision in *Richmond Newspapers* required the invalidation of the mandatory closure rule of § 16A. 383 Mass. 838, 423 N. E. 2d 773 (1981).[7] In analyzing the First Amendment issue,[8] the court recognized that there is "an unbroken tradition of openness" in criminal trials. *Id.*, at 845, 423 N. E. 2d, at 778. But the court discerned "at least one notable exception" to this tradition: "In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult." *Id.*, at 846, 423

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[6] Justice Quirico dissented, being of the view that the mandatory closure rule of § 16A was not limited to the testimony of minor victims, but was applicable to the entire trial.

[7] The court again noted that the First Amendment issue arising from the closure of the then-completed trial was "'capable of repetition yet evading review.'" *Id.*, at 841, n. 4, 423 N. E. 2d, at 775, n. 4, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). But in contrast to the view it had taken in its prior opinion, *supra*, at 600, the court held that the case was *not moot* because of this possibility of repetition without opportunity for review.

[8] The court found it unnecessary to consider Globe's argument that the mandatory closure rule violated the Sixth Amendment rights of the criminal defendant who had been acquitted in the rape trial. Those Sixth Amendment rights, the court stated, were "personal rights" that, "at least in the context of this case, [could] only be asserted by the original criminal defendant." 383 Mass., at 842, 423 N. E. 2d, at 776 (footnote omitted).

N. E. 2d, at 778. The court also emphasized that § 16A's mandatory closure rule furthered "genuine State interests," which the court had identified in its earlier decision as underlying the statutory provision. These interests, the court stated, "would be defeated if a case-by-case determination were used." *Id.*, at 848, 423 N. E. 2d, at 779. While acknowledging that the mandatory closure requirement results in a "temporary diminution" of "the public's knowledge about these trials," the court did not think "that *Richmond Newspapers* require[d] the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims." *Id.*, at 851, 423 N. E. 2d, at 781. The court accordingly dismissed Globe's appeal.[9]

Globe again sought review in this Court. We noted probable jurisdiction. 454 U. S. 1051 (1981). For the reasons that follow, we reverse, and hold that the mandatory closure rule contained in § 16A violates the First Amendment.[10]

II

In this Court, Globe challenges that portion of the trial court's order, approved by the Supreme Judicial Court of Massachusetts, that holds that § 16A requires, under all circumstances, the exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial. Because the entire order expired with the completion of the rape trial at which the defendant was acquitted, we must consider at the outset whether a live controversy remains. Under Art. III, § 2, of the Constitution, our jurisdiction extends only to actual cases or controversies. *Nebraska Press*

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[9] Justice Wilkins filed a concurring opinion in which he expressed concern whether a statute constitutionally could require closure "without specific findings by the judge that the closing is justified by overriding or countervailing interests of the Commonwealth." *Id.*, at 852, 423 N. E. 2d, at 782.

[10] We therefore have no occasion to consider Globe's additional argument that the provision violates the Sixth Amendment.

Assn. v. *Stuart*, 427 U. S. 539, 546 (1976). "The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" *Ibid.*, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S., at 515.

The controversy between the parties in this case is indeed "capable of repetition, yet evading review." It can reasonably be assumed that Globe, as the publisher of a newspaper serving the Boston metropolitan area, will someday be subjected to another order relying on § 16A's mandatory closure rule. See *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 377–378 (1979); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 563 (plurality opinion). And because criminal trials are typically of "short duration," *ibid.*, such an order will likely "evade review, or at least considered plenary review in this Court." *Nebraska Press Assn.* v. *Stuart*, *supra*, at 547. We therefore conclude that the controversy before us is not moot within the meaning of Art. III, and turn to the merits.

III

A

The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment. 448 U. S., at 558–581 (plurality opinion); *id.*, at 584–598 (BRENNAN, J., concurring in judgment); *id.*, at 598–601 (Stewart, J., concurring in judgment); *id.*, at 601–604 (BLACKMUN, J., concurring in judgment).[11]

[11] JUSTICE POWELL took no part in the consideration or decision of *Richmond Newspapers*. But he had indicated previously in a concurring opin-

Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment.[12] But we have long eschewed any "narrow, literal conception" of the Amendment's terms, *NAACP* v. *Button*, 371 U. S. 415, 430 (1963), for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 579–580, and n. 16 (plurality opinion) (citing cases); *id.*, at 587–588, and n. 4 (BRENNAN, J., concurring in judgment). Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. See *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 587–588 (BRENNAN, J., concurring in judgment). See also *id.*, at 575 (plurality opinion) (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). Thus to the extent that the First Amendment embraces a right of access to crim-

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ion in *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979), that he viewed the First Amendment as conferring on the press a right of access to criminal trials. *Id.*, at 397–398.

[12] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amdt. 1.

inal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one.

Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. "[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 569 (plurality opinion). And since that time, the presumption of openness has remained secure. Indeed, at the time of this Court's decision in *In re Oliver*, 333 U. S. 257 (1948), the presumption was so solidly grounded that the Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *Id.*, at 266 (footnote omitted). This uniform rule of openness has been viewed as significant in constitutional terms not only "because the Constitution carries the gloss of history," but also because "a tradition of accessibility implies the favorable judgment of experience." *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 589 (BRENNAN, J., concurring in judgment).[13]

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[13] Appellee argues that criminal trials have not always been open to the press and general public during the testimony of minor sex victims. Brief for Appellee 13–22. Even if appellee is correct in this regard, but see *Gannett Co.* v. *DePasquale*, *supra*, at 423 (BLACKMUN, J., concurring in part and dissenting in part), the argument is unavailing. In *Richmond Newspapers*, the Court discerned a First Amendment right of access to *criminal trials* based in part on the recognition that as a general matter criminal trials have long been presumptively open. Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in *Richmond Newspapers*) or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction. See Part III–B, *infra*.

Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.[14] Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.[15] And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.[16] In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

B

Although the right of access to criminal trials is of constitutional stature, it is not absolute. See *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 581, n. 18 (plurality opinion); *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 570. But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information,

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[14] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 569 (plurality opinion); *id.*, at 596–597 (BRENNAN, J., concurring in judgment); *Gannett Co.* v. *DePasquale*, 443 U. S., at 383; *id.*, at 428–429 (BLACKMUN, J., concurring in part and dissenting in part).

[15] See *Levine* v. *United States*, 362 U. S. 610, 616 (1960); *In re Oliver*, 333 U. S. 257, 268–271 (1948); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 570–571 (plurality opinion); *id.*, at 595 (BRENNAN, J., concurring in judgment); *Gannett Co.* v. *DePasquale*, *supra*, at 428–429 (BLACKMUN, J., concurring in part and dissenting in part).

[16] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 570–571 (plurality opinion); *id.*, at 596 (BRENNAN, J., concurring in judgment); *Gannett Co.* v. *DePasquale*, 443 U. S., at 394 (BURGER, C. J., concurring); *id.*, at 428 (BLACKMUN, J., concurring in part and dissenting in part).

it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. See, *e. g.*, *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982); *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 101–103 (1979); *NAACP* v. *Button*, 371 U. S., at 438.[17] We now consider the state interests advanced to support Massachusetts' mandatory rule barring press and public access to criminal sex-offense trials during the testimony of minor victims.

IV

The state interests asserted to support § 16A, though articulated in various ways, are reducible to two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner.[18] We consider these interests in turn.

We agree with appellee that the first interest—safeguarding the physical and psychological well-being of a minor[19]—is a compelling one. But as compelling as that interest is, it

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[17] Of course, limitations on the right of access that resemble "time, place, and manner" restrictions on protected speech, see *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63, n. 18 (1976), would not be subjected to such strict scrutiny. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 581–582, n. 18 (plurality opinion); *id.*, at 598, n. 23 (BRENNAN, J., concurring in judgment); *id.*, at 600 (Stewart, J., concurring in judgment).

[18] In its opinion following our remand, the Supreme Judicial Court of Massachusetts described the interests in the following terms:

"(a) to encourage minor victims to come forward to institute complaints and give testimony . . . ; (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage . . . ; (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote the sound and orderly administration of justice . . . ; (e) to preserve evidence and obtain just convictions." 383 Mass., at 848, 423 N. E. 2d, at 779.

[19] It is important to note that in the context of § 16A, the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying *in the presence of the press and the general public.*

does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.[20] Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim,[21] and the interests of parents and relatives. Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence.[22] In the case before us, for example, the names of the minor victims were already in the public record,[23] and the record indicates that the victims

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[20] Indeed, the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are *always* required before the right of access may be denied: "Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public." 448 U. S., at 581 (footnote omitted) (emphasis added).

[21] "[I]f the minor victim wanted the public to know precisely what a heinous crime the defendant had committed, the imputed legislative justifications for requiring the closing of the trial during the victim's testimony would in part, at least, be inapplicable." 383 Mass., at 853, 423 N. E. 2d, at 782 (Wilkins, J., concurring).

[22] It appears that while other States have statutory or constitutional provisions that would *allow* a trial judge to close a criminal sex-offense trial during the testimony of a minor victim, no other State has a *mandatory* provision excluding both the press and general public during such testimony. See, *e. g.*, Ala. Code § 12–21–202 (1975); Ariz. Rule Crim. Proc. 9.3; Ga. Code § 81–1006 (1978); La. Rev. Stat. Ann. § 15:469.1 (West 1981); Miss. Const., Art. 3, § 26; N. H. Rev. Stat. Ann. § 632–A:8 (Supp. 1981); N. Y. Jud. Law § 4 (McKinney 1968); N. C. Gen. Stat. § 15–166 (Supp. 1981); N. D. Cent. Code § 27–01–02 (1974); Utah Code Ann. § 78–7–4 (1953); Vt. Stat. Ann., Tit. 12, § 1901 (1973); Wis. Stat. § 970.03(4) (1979–1980). See also Fla. Stat. § 918.16 (1979) (providing for mandatory exclusion of *general public* but not *press* during testimony of minor victims). Of course, we intimate no view regarding the constitutionality of these state statutes.

[23] The Court has held that the government may not impose sanctions for the publication of the names of rape victims lawfully obtained from the pub-

may have been willing to testify despite the presence of the press.[24] If the trial court had been permitted to exercise its discretion, closure might well have been deemed unnecessary. In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.[25]

Nor can § 16A be justified on the basis of the Commonwealth's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in § 16A will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities.[26] Not only is the claim speculative in empirical

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lic record. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975). See also *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979).

[24] See n. 5, *supra*.

[25] Of course, for a case-by-case approach to be meaningful, representatives of the press and general public "must be given an opportunity to be heard on the question of their exclusion." *Gannett Co.* v. *DePasquale*, 443 U. S., at 401 (POWELL, J., concurring). This does not mean, however, that for purposes of this inquiry the court cannot protect the minor victim by denying these representatives the opportunity to confront or cross-examine the victim, or by denying them access to sensitive details concerning the victim and the victim's future testimony. Such discretion is consistent with the traditional authority of trial judges to conduct *in camera* conferences. See *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 598, n. 23 (BRENNAN, J., concurring in judgment). Without such trial court discretion, a State's interest in safeguarding the welfare of the minor victim, determined in an individual case to merit some form of closure, would be defeated before it could ever be brought to bear.

[26] To the extent that it is suggested that, quite apart from encouraging minor victims to testify, § 16A improves the quality and credibility of testi-

terms, but it is also open to serious question as a matter of logic and common sense. Although § 16A bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner. And even if § 16A effectively advanced the State's interest, it is doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward: Surely it cannot be suggested that minor victims of sex crimes are the *only* crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify. The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers:* namely, "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." 448 U. S., at 573 (plurality opinion).

V

For the foregoing reasons, we hold that § 16A, as construed by the Massachusetts Supreme Judicial Court, vio-

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mony, the suggestion also is speculative. And while closure may have such an effect in particular cases, the Court has recognized that, *as a general matter*, "*[o]penness* in court proceedings may *improve* the quality of testimony." *Gannett Co.* v. *DePasquale*, *supra*, at 383 (emphasis added). In the absence of any showing that closure would improve the quality of testimony of *all* minor sex victims, the State's interest certainly cannot justify a *mandatory* closure rule.

lates the First Amendment to the Constitution.[27] Accordingly, the judgment of the Massachusetts Supreme Judicial Court is

Reversed.

JUSTICE O'CONNOR, concurring in the judgment.

In *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980), the Court held that the First Amendment protects the right of press and public to attend criminal trials. I do not interpret that decision to shelter every right that is "necessary to the enjoyment of other First Amendment rights." *Ante*, at 604. Instead, *Richmond Newspapers* rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness. As the plurality opinion in *Richmond Newspapers* stresses, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." 448 U. S., at 575. Thus, I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials.

This case, however, does involve a criminal trial. Moreover, it involves a statute mandating automatic exclusion of the public from certain testimony. As the Court explains, Massachusetts has demonstrated no interest weighty enough to justify application of its automatic bar to all cases, even those in which the victim, defendant, and prosecutor have no objection to an open trial. Accordingly, I concur in the judgment.

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[27] We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

Historically our society has gone to great lengths to protect minors *charged* with crime, particularly by prohibiting the release of the names of offenders, barring the press and public from juvenile proceedings, and sealing the records of those proceedings. Yet today the Court holds unconstitutional a state statute designed to protect not the *accused*, but the minor *victims* of sex crimes. In doing so, it advances a disturbing paradox. Although states are permitted, for example, to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused.

The Court has tried to make its holding a narrow one by not disturbing the authority of state legislatures to enact more narrowly drawn statutes giving trial judges the discretion to exclude the public and the press from the courtroom during the minor victim's testimony. *Ante*, at 611, n. 27. I also do not read the Court's opinion as foreclosing a state statute which mandates closure except in cases where the victim agrees to testify in open court.[1] But the Court's deci-

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[1] It certainly cannot be said that the victims in this case consented to testifying in open court. During a lobby conference prior to trial, the prosecutor informed the trial judge that she had interviewed the victims, that they were concerned about publicity, and would agree to press attendance only if certain guarantees could be given:

"Each of [the three victims] indicated that they had the same concerns and basically they are privacy concerns.

"The difficulty of obtaining any kind of guarantee that the press would not print their names or where they go to school or any personal data or take pictures of them or attempt to interview them, those concerns come from their own privacy interests, as well as the fact that there are grandparents involved with a couple of these victims who do not know what hap-

sion is nevertheless a gross invasion of state authority and a state's duty to protect its citizens—in this case minor victims of crime. I cannot agree with the Court's expansive interpretation of our decision in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980), or its cavalier rejection of the serious interests supporting Massachusetts' mandatory closure rule. Accordingly, I dissent.

I

The Court seems to read our decision in *Richmond Newspapers, supra*, as spelling out a First Amendment right of access to all aspects of all criminal trials under all circumstances. *Ante*, at 605, n. 13. That is plainly incorrect. In *Richmond Newspapers*, we examined "the right of access to places traditionally open to the public" and concluded that criminal trials were generally open to the public throughout this country's history and even before that in England. The opinions of a majority of the Justices emphasized the historical tradition of open criminal trials. 448 U. S., at 564–573; *id.*, at 589–591 (BRENNAN, J., concurring in judgment); *id.*, at 599 (Stewart, J., concurring in judgment); *id.*, at 601 (BLACKMUN, J., concurring in judgment). The proper mode of analysis to be followed in determining whether there is a right of access was emphasized by JUSTICE BRENNAN:

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pened and if they were to find out by reading the paper, everyone was concerned about what would happen then. And they stated that if it were at all possible to obtain a guarantee that this information would not be used, then they wouldn't object to the press being included. I explained that that is [a] very difficult guarantee to obtain because the Court cannot issue a conditional order, or anything like that, but I just wanted to put on the record what their concerns were and what they are afraid of." App. 48a.

It is clear that the victims would "waive" the exclusion of the press only if the trial court gave them guarantees of strict privacy, guarantees that were probably beyond the authority of the court and which themselves would raise grave constitutional problems. See *Oklahoma Publishing Co.* v. *District Court of Oklahoma County*, 430 U. S. 308 (1977); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975).

> "As previously noted, resolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances." *Id.*, at 597–598.

Today JUSTICE BRENNAN ignores the weight of historical practice. There is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors. See, *e. g.*, *Harris* v. *Stephens*, 361 F. 2d 888 (CA8 1966), cert. denied, 386 U. S. 964 (1967); *Reagan* v. *United States*, 202 F. 488 (CA9 1913); *United States* v. *Geise*, 158 F. Supp. 821 (Alaska), aff'd, 262 F. 2d 151 (CA9 1958), cert. denied, 361 U. S. 842 (1959); *Hogan* v. *State*, 191 Ark. 437, 86 S. W. 2d 931 (1935); *State* v. *Purvis*, 157 Conn. 198, 251 A. 2d 178 (1968), cert. denied, 395 U. S. 928 (1969); *Moore* v. *State*, 151 Ga. 648, 108 S. E. 47 (1921), appeal dism'd, 260 U. S. 702 (1922).[2] Several States have long-standing provisions allowing closure of cases involving sexual assaults against minors.[3]

It would misrepresent the historical record to state that there is an "unbroken, uncontradicted history" of open proceedings in cases involving the sexual abuse of minors. *Richmond Newspapers*, *supra*, at 573. Absent such a history of openness, the positions of the Justices joining reversal in *Richmond Newspapers* give no support to the proposition that closure of the proceedings during the testimony of the minor victim violates the First Amendment.[4]

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[2] Cf. *Stamicarbon, N.V.* v. *American Cyanamid Co.*, 506 F. 2d 532, 539–540 (CA2 1974), and cases cited therein.

[3] See, *e. g.*, Ala. Const., Art. VI, § 169 (1901) (repealed 1973); Fla. Stat. § 918.16 (1979); Ga. Code § 81–1006 (1978); Miss. Const., Art. 3, § 26; N. H. Rev. Stat. Ann. § 632–A:8 (Supp. 1981); N. Y. Jud. Law § 4 (McKinney 1968); N. C. Gen. Stat. § 15–166 (Supp. 1981); Utah Code Ann. § 78–7–4 (1953).

[4] It is hard to find a limiting principle in the Court's analysis. The same reasoning might require a hearing before a trial judge could hold a bench conference or any *in camera* proceedings.

II

The Court does not assert that the First Amendment right it discerns from *Richmond Newspapers* is absolute; instead, it holds that when a "State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Ante*, at 606–607. The Court's wooden application of the rigid standard it asserts for this case is inappropriate. The Commonwealth has not denied the public or the media access to information as to what takes place at trial. As the Court acknowledges, Massachusetts does not deny the press and the public access to the trial transcript or to other sources of information about the victim's testimony. Even the victim's identity is part of the public record, although the name of a 16-year-old accused rapist generally would not be a matter of public record. Mass. Gen. Laws Ann., ch. 119, § 60A (West Supp. 1982–1983). The Commonwealth does not deny access to information, and does nothing whatever to inhibit its disclosure. This case is quite unlike others in which we have held unconstitutional state laws which prevent the dissemination of information or the public discussion of ideas. See, *e. g.*, *Brown* v. *Hartlage*, 456 U. S. 45 (1982); *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979); *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978); *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976); *Cox Broadcasting Corp.* v. *Cohen*, 420 U. S. 469 (1975); *NAACP* v. *Button*, 371 U. S. 415 (1963).

The purpose of the Commonwealth in enacting § 16A was to give assurance to parents and minors that they would have this moderate and limited protection from the trauma, embarrassment, and humiliation of having to reveal the intimate details of a sexual assault in front of a large group of unfamiliar spectators—and perhaps a television audience—and to lower the barriers to the reporting of such crimes which might come from the victim's dread of public testimony. *Globe Newspaper Co.* v. *Superior Court*, 379 Mass.

846, 865, 401 N. E. 2d 360, 372 (1980); 383 Mass. 838, 847–848, 423 N. E. 2d 773, 779 (1981).

Neither the purpose of the law nor its effect is primarily to deny the press or public access to information; the verbatim transcript is made available to the public and the media and may be used without limit. We therefore need only examine whether the restrictions imposed are reasonable and whether the interests of the Commonwealth override the very limited incidental effects of the law on First Amendment rights. See *Richmond Newspapers*, 448 U. S., at 580–581 (plurality opinion); *id.*, at 600 (Stewart, J., concurring in judgment); *Pell* v. *Procunier*, 417 U. S. 817 (1974); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). Our obligation in this case is to balance the competing interests: the interests of the media for instant access, against the interest of the State in protecting child rape victims from the trauma of public testimony. In more than half the states, public testimony will include television coverage.

III

For me, it seems beyond doubt, considering the minimal impact of the law on First Amendment rights and the overriding weight of the Commonwealth's interest in protecting child rape victims, that the Massachusetts law is not unconstitutional. The Court acknowledges that the press and the public have prompt and full access to all of the victim's testimony. Their additional interest in actually being present during the testimony is minimal. While denying it the power to protect children, the Court admits that the Commonwealth's interest in protecting the victimized child is a compelling interest. *Ante*, at 607. This meets the test of *Richmond Newspapers*, *supra*.

The law need not be precisely tailored so long as the state's interest overrides the law's impact on First Amendment rights and the restrictions imposed further that interest. Certainly this law, which excludes the press and public only

during the actual testimony of the child victim of a sex crime, rationally serves the Commonwealth's overriding interest in protecting the child from the severe—possibly permanent—psychological damage. It is not disputed that such injury is a reality.[5]

The law also seems a rational response to the undisputed problem of the underreporting of rapes and other sexual offenses. The Court rejects the Commonwealth's argument that § 16A is justified by its interest in encouraging minors to report sex crimes, finding the claim "speculative in empirical terms [and] open to serious question as a matter of logic and common sense." *Ante*, at 609–610. There is no basis whatever for this cavalier disregard of the reality of human experience. It makes no sense to criticize the Commonwealth for its failure to offer empirical data in support of its rule; only by allowing state experimentation may such empirical evidence be produced. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). See also *Chandler* v. *Florida*, 449 U. S. 560, 579–580 (1981); *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 441 (1980); *Whalen* v. *Roe*, 429 U. S. 589, 597, and n. 20 (1977).

The Court also concludes that the Commonwealth's assertion that the law might reduce underreporting of sexual offenses fails "as a matter of logic and common sense." This conclusion is based on a misperception of the Commonwealth's argument and an overly narrow view of the protection the statute seeks to afford young victims. The Court apparently believes that the statute does not prevent any sig-

[5] For a discussion of the traumatic effect of court proceedings on minor rape victims, see E. Hilberman, The Rape Victim 53–54 (1976); S. Katz & M. Mazur, Understanding the Rape Victim: A Synthesis of Research Findings 198–200 (1979), and studies cited therein.

nificant trauma, embarrassment, or humiliation on the part of the victim simply because the press is not prevented from discovering and publicizing both the identity of the victim and the substance of the victim's testimony. *Ante*, at 609–610. Section 16A is intended not to preserve confidentiality, but to prevent the risk of severe psychological damage caused by having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers.[6] In most states, that crowd may be expanded to include a live television audience, with reruns on the evening news. That ordeal could be difficult for an adult; to a child, the experience can be devastating and leave permanent scars.[7]

The Commonwealth's interests are clearly furthered by the mandatory nature of the closure statute. Certainly if the law were discretionary, most judges would exercise that discretion soundly and would avoid unnecessary harm to the child, but victims and their families are entitled to assurance of such protection. The legislature did not act irrationally in deciding not to leave the closure determination to the idiosyncracies of individual judges subject to the pressures avail-

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[6] As one commentator put it: "Especially in cases involving minors, the courts stress the serious embarrassment and shame of the victim who is forced to testify to sexual acts or whose intimate life is revealed in detail before a crowd of the idly curious." Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 88 (1977). The victim's interest in avoiding the humiliation of testifying in open court is thus quite separate from any interest in preventing the public from learning of the crime. It is ironic that the Court emphasizes the failure of the Commonwealth to seal the trial transcript and bar disclosure of the victim's identity. The Court implies that a state law more severely encroaching upon the interests of the press and public would be upheld.

[7] See Hilberman, *supra;* L. Holmstrom & A. Burgess, The Victim of Rape: Institutional Reactions 222, 227 (1978); Berger, *supra*, at 88, 92–93; Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977, 1021 (1969). Holmstrom and Burgess report that nearly half of all *adult* rape victims were disturbed by the public setting of their trials. Certainly the impact on children must be greater.

able to the media. The victim might very well experience considerable distress prior to the court appearance, wondering, in the absence of such statutory protection, whether public testimony will be required. The mere possibility of public testimony may cause parents and children to decide not to report these heinous crimes. If, as psychologists report, the courtroom experience in such cases is almost as traumatic as the crime itself,[8] a state certainly should be able to take whatever reasonable steps it believes are necessary to reduce that trauma. Furthermore, we cannot expect victims and their parents to be aware of all of the nuances of state law; a person who sees newspaper, or perhaps even television, reports of a minor victim's testimony may very well be deterred from reporting a crime on the belief that public testimony will be required. It is within the power of the state to provide for mandatory closure to alleviate such understandable fears and encourage the reporting of such crimes.

IV

There is, of course, "a presumption of openness [that] inheres in the very nature of a criminal trial under our system of justice." But we have consistently emphasized that this presumption is not absolute or irrebuttable. A majority of the Justices in *Richmond Newspapers* acknowledged that closure might be permitted under certain circumstances. Justice Stewart's separate opinion pointedly recognized that exclusion of the public might be justified to protect "the sensibilities of a youthful prosecution witness . . . in a criminal trial for rape." 448 U. S., at 600, n. 5.[9] The Massachusetts statute has a relatively minor incidental impact on First

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[8] See Bohmer & Blumberg, Twice Traumatized: The Rape Victim and the Court, 58 Judicature 390 (1975); Katz & Mazur, *supra;* Holmstrom & Burgess, *supra;* Hilberman, *supra;* Berger, *supra.*

[9] See also 448 U. S., at 580–581; *id.*, at 582 (WHITE, J., concurring); *id.*, at 584 (STEVENS, J., concurring); *id.*, at 598 (BRENNAN, J., concurring in judgment).

Amendment rights and gives effect to the overriding state interest in protecting child rape victims. Paradoxically, the Court today denies the victims the kind of protection routinely given to juveniles who commit crimes. Many will find it difficult to reconcile the concern so often expressed for the rights of the accused with the callous indifference exhibited today for children who, having suffered the trauma of rape or other sexual abuse, are denied the modest protection the Massachusetts Legislature provided.

JUSTICE STEVENS, dissenting.

The duration of a criminal trial generally is shorter than the time it takes for this Court's jurisdiction to be invoked and our judgment on the merits to be announced. As a result, our power to review pretrial or midtrial orders implicating the freedom of the press has rested on the exception to the mootness doctrine for orders "capable of repetition, yet evading review." See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 563; *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 377–378; *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546–547.

Today the Court expands that exception in order to pass on the constitutionality of a statute that, as presently construed, has never been applied in a live controversy. In this case, unlike the three cases cited above, the governing state law was materially changed after the trial court's order had expired by its own terms. There consequently is no possibility "'that the same complaining party will be subject to the same action again.'" *Gannett Co.* v. *DePasquale*, *supra*, at 377 (quoting *Weinstein* v. *Bradford*, 423 U. S. 147, 149).

The fact that the Massachusetts Supreme Judicial Court narrowly construed—and then upheld in the abstract—the state statute that the trial court had read to mandate the closure of the entire trial bears on our review function in other respects. We have only recently recognized the First

Amendment right of access to newsworthy matter. See *ante*, at 603; *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 582 (STEVENS, J., concurring). In developing constitutional jurisprudence, there is a special importance in deciding cases on concrete facts. Cf. *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 120–127; *United States* v. *Raines*, 362 U. S. 17, 21. Only in specific controversies can the Court decide how this right of access to criminal trials can be accommodated with other societal interests, such as the protection of victims or defendants. The advisory opinion the Court announces today sheds virtually no light on how such rights should be accommodated.

The question whether the Court should entertain a facial attack on a statute that bears on the right of access cannot be answered simply by noting that the right has its source in the First Amendment. See, *e. g.*, *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380–381; *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 61. For the right of access is plainly not coextensive with the right of expression that was vindicated in *Nebraska Press Assn.*, *supra*.[1] Because statutes that bear on this right of access do not deter protected activity in the way that other laws sometimes interfere with the right of expression, we should follow the norm of reviewing these statutes as applied rather than on their face.

It is not clear when, if ever, the Court will need to confront the question whether a mandatory partial-closure statute is unconstitutional. If the order hypothesized by the Supreme Judicial Court, instead of the trial court's order, had actually been entered in this case, and if the press had been given prompt access to a transcript of the testimony of the minor victims, appellant might not even have appealed. At the

[1] For example, even though a reporter may have no right of access to a judge's side-bar conference, it surely does not follow that the judge could enjoin publication of what a reporter might have learned about such a conference.

very least the press, the prosecutor, and defense counsel would have argued the constitutionality of the partial-closure order in the context of the facts relevant to such an order, and a different controversy would have been framed for appellate review. In future cases the trial courts may voluntarily follow the direction of Justice Wilkins and make specific findings demonstrating a compelling state interest supporting the mandated partial-closure order. See 383 Mass. 838, 852–853, 423 N. E. 2d 773, 782 (concurring opinion). Or the record in future cases may plainly disclose a justification for a partial closure that the Court would consider acceptable. Thus, aside from the illumination provided by live controversies, a decision to review only orders actually entered pursuant to the Massachusetts statute would advance the policy of avoiding the premature and unnecessary adjudication of constitutional questions;[2] it is at least conceivable that no such order may ever have to be justified by the conclusion of the legislature that the mandatory closure of the trial during the testimony of a minor victim of a sex crime is necessary to serve important state interests.

The Court does not hold that on this record a closure order limited to the testimony of the minor victims would have been unconstitutional. Rather, the Court holds only that if ever such an order is entered, it must be supported by adequate findings. Normally, if the constitutional deficiency is the absence of findings to support a trial order, the Court would either remand for factfinding, or examine the record itself, before deciding whether the order measured up to constitutional standards. The infeasibility of this course of action—since no such order was entered in this case and since the order that was entered has expired—further demon-

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[2] "But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." *United States* v. *Lovett*, 328 U. S. 303, 320 (Frankfurter, J., concurring).

strates that the Court's comment on the First Amendment issues implicated by the Massachusetts statute is advisory, hypothetical, and, at best, premature.[3]

I would dismiss the appeal.

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[3] The "capable of repetition, yet evading review" exception to the mootness doctrine generally is compatible with our settled policy of avoiding the premature adjudication of constitutional questions, see *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 756, n. 8, for an order that is capable of repetition yet evading review generally is no less ripe for review the first time it is presented than it would be on subsequent occasions. But when the "order" that is presented for review the first time is formulated in the abstract, as was the ruling of the Supreme Judicial Court in this case, the policy requires the Court to defer review of such an order until it is entered in a live controversy.

EDGAR *v.* MITE CORP. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80–1188. Argued November 30, 1981—Decided June 23, 1982

The Illinois Business Take-Over Act requires a tender offeror to notify the Secretary of State and the target company of its intent to make a tender offer and the terms of the offer 20 days before the offer becomes effective. During that time the offeror may not communicate its offer to the shareholders, but the target company is free to disseminate information to its shareholders concerning the impending offer. The Act also requires any takeover offer to be registered with the Secretary of State. A target company is defined as a corporation of which Illinois shareholders own 10% of the class of securities subject to the takeover offer or for which any two of the following conditions are met: the corporation has its principal office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented within the State. An offer becomes registered 20 days after a registration statement is filed with the Secretary of State unless he calls a hearing to adjudicate the fairness of the offer. Appellee MITE Corp., a corporation organized under Delaware laws with its principal office in Connecticut, initiated a tender offer for all outstanding shares of Chicago Rivet & Machine Co., an Illinois corporation, by filing with the Securities and Exchange Commission the schedule required by the Williams Act. MITE, however, did not comply with the Illinois Act, and brought an action in Federal District Court seeking a declaratory judgment that the Illinois Act was pre-empted by the Williams Act and violated the Commerce Clause, and also seeking injunctive relief. The District Court issued a preliminary injunction prohibiting enforcement of the Illinois Act against MITE's tender offer. MITE then published its offer. Subsequently, the District Court issued the requested declaratory judgment and a permanent injunction. Shortly thereafter, MITE and Chicago Rivet entered into an agreement whereby both MITE's tender offer and an offer made by Chicago Rivet before the District Court entered its judgment were withdrawn and MITE was given a specified time to make another offer. Ultimately, MITE decided not to make another offer. The Court of Appeals affirmed the District Court.

Held: The judgment is affirmed.

633 F. 2d 486, affirmed.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I, II, and V–B, concluding that:

1. The case is not moot. Because the Secretary of State has indicated his intention to enforce the Illinois Act against MITE, a reversal of the District Court's judgment would expose MITE to civil and criminal liability for making an offer in violation of the Act. P. 630.

2. The Illinois Act is unconstitutional under the Commerce Clause, because it imposes burdens on interstate commerce that are excessive in light of the local interests the Act purports to further. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137. Illinois' asserted interests in protecting resident security holders and regulating the internal affairs of companies incorporated under Illinois law are insufficient to outweigh such burdens. Pp. 643–646.

WHITE, J., delivered an opinion, joined in its entirety by BURGER, C. J., Parts I, II, and V–B of which are the opinion of the Court. BLACKMUN, J., joined Parts I, II, III, and IV. POWELL, J., joined Parts I and V–B. STEVENS and O'CONNOR, JJ., joined Parts I, II, and V. POWELL, J., filed an opinion concurring in part, *post*, p. 646. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 647. O'CONNOR, J., filed an opinion concurring in part, *post*, p. 655. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 655. REHNQUIST, J., filed a dissenting opinion, *post*, p. 664.

Russell C. Grimes, Jr., Assistant Attorney General of Illinois, argued the cause for appellant. With him on the briefs were *Tyrone C. Fahner*, Attorney General, and *Paul J. Bargiel*, Assistant Attorney General.

Richard W. Hulbert argued the cause for appellees. With him on the brief was *Christopher H. Lunding*.

Eugene D. Berman, Assistant Attorney General, argued the cause for the State of New York as *amicus curiae* urging reversal. With him on the brief were *Robert Abrams*, Attorney General, *Shirley Adelson Siegel*, Solicitor General, *Linda S. Martinson*, Deputy Assistant Attorney General, and *Elizabeth Block*, Assistant Attorney General.

Stephen M. Shapiro argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General*

Wallace, Assistant Attorney General Baxter, Deputy Solicitor General Geller, Ralph C. Ferrara, Paul Gonson, Daniel L. Goelzer, and *James R. Farrand.**

JUSTICE WHITE delivered an opinion, Parts I, II, and V–B of which are the opinion of the Court.†

The issue in this case is whether the Illinois Business Take-Over Act, Ill. Rev. Stat., ch. 121½, ¶137.51 *et seq.* (1979), is unconstitutional under the Supremacy and Commerce Clauses of the Federal Constitution.

I

Appellee MITE Corp. and its wholly owned subsidiary, MITE Holdings, Inc., are corporations organized under the laws of Delaware with their principal executive offices in Connecticut. Appellant James Edgar is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Act. Under the Illinois Act any takeover offer[1] for the shares of a target company must be

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*Briefs of *amici curiae* urging reversal were filed by *William J. Brown*, Attorney General, and *Roger P. Sugarman*, Assistant Attorney General, for the State of Ohio; by *Marshall Coleman*, Attorney General, *Walter H. Ryland*, Chief Deputy Attorney General, and *Karen A. Gould*, Assistant Attorney General, for the Commonwealth of Virginia; and by *Orestes J. Mihaly*, *Stephen M. Coons*, and *K. Houston Matney* for the North American Securities Administrators Association, Inc.

†THE CHIEF JUSTICE joins the opinion in its entirety; JUSTICE BLACKMUN joins Parts I, II, III, and IV; JUSTICE POWELL joins Parts I and V–B; and JUSTICE STEVENS and JUSTICE O'CONNOR join Parts I, II, and V.

[1]The Illinois Act defines "take-over offer" as "the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer . . . ." Ill. Rev. Stat., ch. 121½, ¶137.52–9 (1979). "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1251 (1973) (footnotes omitted). The terms "tender offer" and "takeover offer" are often used interchangeably.

registered with the Secretary of State. Ill. Rev. Stat., ch. 121½, ¶ 137.54.A (1979). A target company is defined as a corporation or other issuer of securities of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the State. ¶ 137.52–10. An offer becomes registered 20 days after a registration statement is filed with the Secretary unless the Secretary calls a hearing. ¶ 137.54.E. The Secretary may call a hearing at any time during the 20-day waiting period to adjudicate the substantive fairness of the offer if he believes it is necessary to protect the shareholders of the target company, and a hearing must be held if requested by a majority of a target company's outside directors or by Illinois shareholders who own 10% of the class of securities subject to the offer. ¶ 137.57.A. If the Secretary does hold a hearing, he is directed by the statute to deny registration to a tender offer if he finds that it "fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees . . . ." ¶ 137.57.E.

On January 19, 1979, MITE initiated a cash tender offer for all outstanding shares of Chicago Rivet & Machine Co., a publicly held Illinois corporation, by filing a Schedule 14D–1 with the Securities and Exchange Commission in order to comply with the Williams Act.[2] The Schedule 14D–1 indi-

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[2]The Williams Act, 82 Stat. 454, codified at 15 U. S. C. §§ 78m(d)–(e) and 78n(d)–(f), added new §§ 13(d), 13(e), and 14(d)–(f) to the Securities Exchange Act of 1934. Section 14(d)(1) of the Securities Exchange Act requires an offeror seeking to acquire more than 5% of any class of equity security by means of a tender offer to first file a Schedule 14D–1 with the Securities and Exchange Commission. The Schedule requires disclosure

cated that MITE was willing to pay $28 per share for any and all outstanding shares of Chicago Rivet, a premium of approximately $4 over the then-prevailing market price. MITE did not comply with the Illinois Act, however, and commenced this litigation on the same day by filing an action in the United States District Court for the Northern District of Illinois. The complaint asked for a declaratory judgment that the Illinois Act was pre-empted by the Williams Act and violated the Commerce Clause. In addition, MITE sought a temporary restraining order and preliminary and permanent injunctions prohibiting the Illinois Secretary of State from enforcing the Illinois Act.

Chicago Rivet responded three days later by bringing suit in Pennsylvania, where it conducted most of its business, seeking to enjoin MITE from proceeding with its proposed tender offer on the ground that the offer violated the Pennsylvania Takeover Disclosure Law, Pa. Stat. Ann., Tit. 70, § 71 *et seq.* (Purdon Supp. 1982–1983). After Chicago Rivet's efforts to obtain relief in Pennsylvania proved unsuccessful,[3] both Chicago Rivet and the Illinois Secretary of State

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of the source of funds used to purchase the target shares, past transactions with the target company, and other material financial information about the offeror. In addition, the offeror must disclose any antitrust or other legal problems which might result from the success of the offer. 17 CFR § 240.14d–100 (1981). Section 14(d)(1) requires the offeror to publish or send a statement of the relevant facts contained in the Schedule 14D–1 to the shareholders of the target company.

In addition, § 13(d), added by the Williams Act, requires a purchaser of any equity security registered pursuant to § 12 of the Securities Exchange Act, 15 U. S. C. § 78*l*, to file a Schedule 13D with the Commission within 10 days after its purchases have exceeded 5% of the outstanding shares of the security. Schedule 13D requires essentially the same disclosures as required by Schedule 14D–1. Compare 17 CFR § 240.13d–101 (1981) with 17 CFR § 240.14d–100 (1981).

[3] In addition to filing suit in state court, Chicago Rivet filed a complaint with the Pennsylvania Securities Commission requesting the Commission to enforce the Pennsylvania Act against MITE. On January 31, 1979, the

took steps to invoke the Illinois Act. On February 1, 1979, the Secretary of State notified MITE that he intended to issue an order requiring it to cease and desist further efforts to make a tender offer for Chicago Rivet. On February 2, 1979, Chicago Rivet notified MITE by letter that it would file suit in Illinois state court to enjoin the proposed tender offer. MITE renewed its request for injunctive relief in the District Court and on February 2 the District Court issued a preliminary injunction prohibiting the Secretary of State from enforcing the Illinois Act against MITE's tender offer for Chicago Rivet.

MITE then published its tender offer in the February 5 edition of the Wall Street Journal. The offer was made to all shareholders of Chicago Rivet residing throughout the United States. The outstanding stock was worth over $23 million at the offering price. On the same day Chicago Rivet made an offer for approximately 40% of its own shares at $30 per share.[4] The District Court entered final judgment on February 9, declaring that the Illinois Act was pre-empted by the Williams Act and that it violated the Commerce Clause. Accordingly, the District Court permanently enjoined enforcement of the Illinois statute against MITE. Shortly after final judgment was entered, MITE and Chicago Rivet entered into an agreement whereby both tender offers were withdrawn and MITE was given 30 days to examine the books and records of Chicago Rivet. Under the agreement MITE was either to make a tender offer of $31 per share be-

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Pennsylvania Securities Commission decided that it would not invoke the Pennsylvania Takeover Disclosure Law. The next day, the United States District Court for the Western District of Pennsylvania, to which MITE had removed the state-court action, denied Chicago Rivet's motion for a temporary restraining order.

[4] Chicago Rivet's offer for its own shares was exempt from the requirements of the Illinois Act pursuant to Ill. Rev. Stat., ch. 121½, ¶ 137.52–9(4) (1979).

fore March 12, 1979, which Chicago Rivet agreed not to oppose, or decide not to acquire Chicago Rivet's shares or assets. App. to Brief for Appellees 1a–4a. On March 2, 1979, MITE announced its decision not to make a tender offer.

The United States Court of Appeals for the Seventh Circuit affirmed *sub nom. MITE Corp.* v. *Dixon*, 633 F. 2d 486 (1980). It agreed with the District Court that several provisions of the Illinois Act are pre-empted by the Williams Act and that the Illinois Act unduly burdens interstate commerce in violation of the Commerce Clause. We noted probable jurisdiction, 451 U. S. 968 (1981), and now affirm.

II

The Court of Appeals specifically found that this case was not moot, 633 F. 2d, at 490, reasoning that because the Secretary has indicated he intends to enforce the Act against MITE, a reversal of the judgment of the District Court would expose MITE to civil and criminal liability[5] for making the February 5, 1979, offer in violation of the Illinois Act. We agree. It is urged that the preliminary injunction issued by the District Court is a complete defense to civil or criminal penalties. While, as JUSTICE STEVENS' concurrence indicates, that is not a frivolous question by any means; it is an issue to be decided when and if the Secretary of State initiates an action. That action would be foreclosed if we agree with the Court of Appeals that the Illinois Act is unconstitutional. Accordingly, the case is not moot.

III

We first address the holding that the Illinois Take-Over Act is unconstitutional under the Supremacy Clause. We note at the outset that in passing the Williams Act, which is

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[5] The Secretary of State may bring an action for civil penalties for violations of the Illinois Act., Ill. Rev. Stat., ch. 121½, ¶ 137.65 (1979), and a person who willfully violates the Act is subject to criminal prosecution. ¶ 137.63.

an amendment to the Securities Exchange Act of 1934, Congress did not also amend § 28(a) of the 1934 Act, 15 U. S. C. § 78bb(a).[6] In pertinent part, § 28(a) provides as follows:

> "Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder." 48 Stat. 903.

Thus Congress did not explicitly prohibit States from regulating takeovers; it left the determination whether the Illinois statute conflicts with the Williams Act to the courts. Of course, a state statute is void to the extent that it actually conflicts with a valid federal statute; and

> "[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941); *Jones* v. *Rath Packing Co.*, [430 U. S. 519,] 526, 540–541 [(1977)]. Accord, *De Canas* v. *Bica*, 424 U. S. 351, 363 (1976)." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Our inquiry is further narrowed in this case since there is no contention that it would be impossible to comply with both

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[6] There is no evidence in the legislative history that Congress was aware of state takeover laws when it enacted the Williams Act. When the Williams Act was enacted in 1968, only Virginia had a takeover statute. The Virginia statute, Va. Code § 13.1–528 (1978), became effective March 5, 1968; the Williams Act was enacted several months later on July 19, 1968. Takeover statutes are now in effect in 37 States. Sargent, On the Validity of State Takeover Regulation: State Responses to *MITE* and *Kidwell*, 42 Ohio St. L. J. 689, 690, n. 7 (1981).

the provisions of the Williams Act and the more burdensome requirements of the Illinois law. The issue thus is, as it was in the Court of Appeals, whether the Illinois Act frustrates the objectives of the Williams Act in some substantial way.

The Williams Act, passed in 1968, was the congressional response to the increased use of cash tender offers in corporate acquisitions, a device that had "removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act filled this regulatory gap. The Act imposes several requirements. First, it requires that upon the commencement of the tender offer, the offeror file with the SEC, publish or send to the shareholders of the target company, and furnish to the target company detailed information about the offer. 15 U. S. C. § 78n(d)(1); 17 CFR § 240.24d–3 (1981). The offeror must disclose information about its background and identity; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. 15 U. S. C. § 78m(d)(1) (1976 ed., Supp. IV); 17 CFR § 240.13d–1 (1981). See also n. 2, *supra*. Second, stockholders who tender their shares may withdraw them during the first 7 days of a tender offer and if the offeror has not yet purchased their shares, at any time after 60 days from the commencement of the offer. 15 U. S. C. § 78n(d)(5).[7] Third, all shares tendered must be purchased for the same price; if an offering price is increased, those who have already tendered receive the benefit of the increase. 15 U. S. C. § 78n(d)(7).[8]

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[7] The 7-day withdrawal period contained in the Williams Act has been extended to 15 business days by the Commission. 17 CFR § 240.14d–7(a)(1) (1981).

[8] The Williams Act also provides that when the number of shares tendered exceeds the number of shares sought in the offer, those shares tendered during the first 10 days of the offer must be purchased on a pro rata

There is no question that in imposing these requirements, Congress intended to protect investors. *Piper* v. *Chris-Craft Industries, Inc., supra*, at 35; *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 58 (1975); S. Rep. No. 550, 90th Cong., 1st Sess., 3–4 (1967) (Senate Report). But it is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder. As we noted in *Piper*, the disclosure provisions originally embodied in S. 2731 "were avowedly pro-management in the target company's efforts to defeat takeover bids." 430 U. S., at 30. But Congress became convinced "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." Senate Report, at 3.[9] It also became apparent that entrenched management was often successful in defeating takeover attempts. As the legislation evolved, therefore, Congress disclaimed any "intention to provide a weapon for management to discourage takeover bids," *Rondeau* v. *Mosinee Paper Corp., supra*, at 58, and expressly embraced a policy of neutrality. As Senator Williams explained: "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids." 113 Cong. Rec. 24664 (1967). This policy of "evenhandedness," *Piper* v. *Chris-Craft Industries, Inc., supra*, at 31, represented a conviction that neither side in the contest should be extended additional advantages vis-à-vis the investor, who if furnished with adequate information would be in a position to make his

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basis. 15 U. S. C. § 78n(d)(6). The Act also contains a general antifraud provision, 15 U. S. C. § 78n(e), which has been interpreted to require disclosure of material information known to the offeror even if disclosure were not otherwise required. See, *e. g.*, *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F. 2d 247, 250 (CA2 1973).

[9] Congress also did not want to deny shareholders "the opportunities which result from the competitive bidding for a block of stock of a given company," namely, the opportunity to sell shares for a premium over their market price. 113 Cong. Rec. 24666 (1967) (remarks of Sen. Javits).

own informed choice. We, therefore, agree with the Court of Appeals that Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice. 633 F. 2d, at 496.

To implement this policy of investor protection while maintaining the balance between management and the bidder, Congress required the latter to file with the Commission and furnish the company and the investor with all information adequate to the occasion. With that filing, the offer could go forward, stock could be tendered and purchased, but a stockholder was free within a specified time to withdraw his tendered shares. He was also protected if the offer was increased. Looking at this history as a whole, it appears to us, as it did to the Court of Appeals, that Congress intended to strike a balance between the investor, management, and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no "inten[tion] to do . . . more than give incumbent management an opportunity to express and explain its position." *Rondeau* v. *Mosinee Paper Corp.*, *supra*, at 58. Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time frame provided by Congress.

IV

The Court of Appeals identified three provisions of the Illinois Act that upset the careful balance struck by Congress and which therefore stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress. We agree with the Court of Appeals in all essential respects.

A

The Illinois Act requires a tender offeror to notify the Secretary of State and the target company of its intent to make a

tender offer and the material terms of the offer 20 business days before the offer becomes effective. Ill. Rev. Stat., ch. 121½, ¶¶ 137.54.E, 137.54.B (1979). During that time, the offeror may not communicate its offer to the shareholders. ¶ 137.54.A. Meanwhile, the target company is free to disseminate information to its shareholders concerning the impending offer. The contrast with the Williams Act is apparent. Under that Act, there is no precommencement notification requirement; the critical date is the date a tender offer is "first published or sent or given to security holders." 15 U. S. C. § 78n(d)(1). See also 17 CFR § 240.14d–2 (1981).

We agree with the Court of Appeals that by providing the target company with additional time within which to take steps to combat the offer, the precommencement notification provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the stockholders who will not have an offer before them during this period.[10] These consequences are precisely what Congress determined should be avoided, and for this reason, the precommencement notification provision frustrates the objectives of the Williams Act.

It is important to note in this respect that in the course of events leading to the adoption of the Williams Act, Congress several times refused to impose a precommencement disclosure requirement. In October 1965, Senator Williams introduced S. 2731, a bill which would have required a bidder to notify the target company and file a public statement with the Securities and Exchange Commission at least 20 days before commencement of a cash tender offer for more than 5% of a class of the target company's securities. 111 Cong. Rec. 28259 (1965). The Commission commented on the bill and stated that "the requirement of a 20-day advance notice to the issuer and the Commission is unnecessary for the protection of security holders . . . ." 112 Cong. Rec. 19005 (1966).

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[10] See n. 11 and accompanying text, *infra*.

Senator Williams introduced a new bill in 1967, S. 510, which provided for a confidential filing by the tender offeror with the Commission five days prior to the commencement of the offer. S. 510 was enacted as the Williams Act after elimination of the advance disclosure requirement. As the Senate Report explained:

> "At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public." Senate Report, at 4.

Congress rejected another precommencement notification proposal during deliberations on the 1970 amendments to the Williams Act.[11]

B

For similar reasons, we agree with the Court of Appeals

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[11] H. R. 4285, 91st Cong., 2d Sess. (1970). The bill was not reported out of the Subcommittee. Instead, the Senate amendments to the Williams Act, which did not contain precommencement notification provisions, were adopted. Pub. L. 91–567, 84 Stat. 1497.

The Securities and Exchange Commission has promulgated detailed rules governing the conduct of tender offers. Rule 14d–2(b), 17 CFR § 240.14d–2(b) (1981), requires that a tender offeror make its offer effective within five days of publicly announcing the material terms of the offer by disseminating specified information to shareholders and filing the requisite documents with the Commission. Otherwise the offeror must announce that it is withdrawing its offer. The events in this litigation took place prior to the effective date of Rule 14d–2(b), and because Rule 14d–2(b) operates prospectively only, see 44 Fed. Reg. 70326 (1979), it is not at issue in this case.

that the hearing provisions of the Illinois Act frustrate the congressional purpose by introducing extended delay into the tender offer process. The Illinois Act allows the Secretary of State to call a hearing with respect to any tender offer subject to the Act, and the offer may not proceed until the hearing is completed. Ill. Rev. Stat., ch. 121½, ¶¶ 137.57.A and B (1979). The Secretary may call a hearing at any time prior to the commencement of the offer, and there is no deadline for the completion of the hearing. ¶¶ 137.57.C and D. Although the Secretary is to render a decision within 15 days after the conclusion of the hearing, that period may be extended without limitation. Not only does the Secretary of State have the power to delay a tender offer indefinitely, but incumbent management may also use the hearing provisions of the Illinois Act to delay a tender offer. The Secretary is required to call a hearing if requested to do so by, among other persons, those who are located in Illinois "as determined by post office address as shown on the records of the target company and who hold of record or beneficially, or both, at least 10% of the outstanding shares of any class of equity securities which is the subject of the take-over offer." ¶ 137.57.A. Since incumbent management in many cases will control, either directly or indirectly, 10% of the target company's shares, this provision allows management to delay the commencement of an offer by insisting on a hearing. As the Court of Appeals observed, these provisions potentially afford management a "powerful weapon to stymie indefinitely a takeover." 633 F. 2d, at 494.[12] In enacting the Williams Act, Congress itself "recognized that delay can seriously impede a tender offer" and sought to avoid it. *Great*

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[12] Delay has been characterized as "the most potent weapon in a tender-offer fight." Langevoort, State Tender-Offer Legislation: Interests, Effects, and Political Competency, 62 Cornell L. Rev. 213, 238 (1977). See also Wachtell, Special Tender Offer Litigation Tactics, 32 Bus. Law. 1433, 1437–1442 (1977); Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality, 45 Ford. L. Rev. 1, 9–10 (1976).

Western United Corp. v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978); Senate Report, at 4.[13]

Congress reemphasized the consequences of delay when it enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1397, 15 U. S. C. § 12 *et seq.*

> "[I]t is clear that this short waiting period [the 10-day period for proration provided for by § 14(d)(6) of the Securities Exchange Act, which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success." H. R. Rep. No. 94–1373, p. 12 (1976).[14]

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[13] According to the Securities and Exchange Commission, delay enables a target company to:

"(1) repurchase its own securities;

"(2) announce dividend increases or stock splits;

"(3) issue additional shares of stock;

"(4) acquire other companies to produce an antitrust violation should the tender offer succeed;

"(5) arrange a defensive merger;

"(6) enter into restrictive loan agreements; and

"(7) institute litigation challenging the tender offer." Brief for Securities and Exchange Commission as *Amicus Curiae* 10, n. 8.

[14] Representative Rodino set out the consequences of delay in greater detail when he described the relationship between the Hart-Scott-Rodino Act and the Williams Act:

"In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act. . . . Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime

As we have said, Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay. The potential for delay provided by the hearing provisions upset the balance struck by Congress by favoring management at the expense of stockholders. We therefore agree with the Court of Appeals that these hearing provisions conflict with the Williams Act.

C

The Court of Appeals also concluded that the Illinois Act is pre-empted by the Williams Act insofar as it allows the Secretary of State of Illinois to pass on the substantive fairness of a tender offer. Under ¶ 137.57.E of the Illinois law, the Secretary is required to deny registration of a takeover offer if he finds that the offer "fails to provide full and fair disclosure to the offerees . . . *or that the take-over offer is inequitable* . . ." (emphasis added).[15] The Court of Appeals understood the Williams Act and its legislative history to indicate that Congress intended for investors to be free to make their own decisions. We agree. Both the House and Senate Reports observed that the Act was "designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision." H. R. Rep. No. 1711, 90th Cong.,

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employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so." 122 Cong. Rec. 30877 (1976).

[15] Appellant argues that the Illinois Act does not permit him to adjudicate the substantive fairness of a tender offer. Brief for Appellant 21–22. On this state-law issue, however, we follow the view of the Court of Appeals that ¶ 137.57.E allows the Secretary of State "to pass upon the substantive fairness of a tender offer . . . ." 633 F. 2d 486, 493 (1980).

2d Sess., 4 (1968); Senate Report, at 3. Thus, as the Court of Appeals said, "[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress." 633 F. 2d, at 494.

V

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U. S. Const., Art. I, § 8, cl. 3. "[A]t least since *Cooley* v. *Board of Wardens*, 12 How. 299 (1852), it has been clear that 'the Commerce Clause. . . . even without implementing legislation by Congress is a limitation upon the power of the States.'" *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366, 370–371 (1976), quoting *Freeman* v. *Hewitt*, 329 U. S. 249, 252 (1946). See also *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980). Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), citing *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 443 (1960). The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited. *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 199 (1925). See also *Pike* v. *Bruce Church, Inc.*, *supra*, at 142. The Illinois Act violates these principles for two reasons. First, it directly regulates and prevents, unless its terms are satisfied, interstate tender offers which in turn would generate interstate transactions. Second, the burden the Act imposes on interstate commerce is excessive in light of the local interests the Act purports to further.

A

States have traditionally regulated intrastate securities transactions,[16] and this Court has upheld the authority of States to enact "blue-sky" laws against Commerce Clause challenges on several occasions. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559 (1917); *Merrick* v. *N. W. Halsey & Co.*, 242 U. S. 568 (1917). The Court's rationale for upholding blue-sky laws was that they only regulated transactions occurring within the regulating States. "The provisions of the law . . . apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed . . . , they are only affected by the requirement of a license of one who deals with them *within* the State. . . . Such regulations affect interstate commerce in [securities] only incidentally." *Hall* v. *Geiger-Jones Co.*, *supra*, at 557–558 (citations omitted). Congress has also recognized the validity of such laws governing intrastate securities transactions in § 28(a) of the Securities Exchange Act, 15 U. S. C. § 78bb(a), a provision "designed to save state blue-sky laws from pre-emption." *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 182, n. 13 (1979).

The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois. A tender offer for securities of a publicly held corporation is ordinarily communicated by the use of the mails or other means of interstate commerce to shareholders across the country and abroad. Securities are tendered and transactions closed by similar means. Thus, in this case, MITE

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[16] For example, the Illinois blue-sky law, Ill. Rev. Stat., ch. 121½, ¶ 137.1 *et seq.* (1979 and Supp. 1980), provides that securities subject to the law must be registered "prior to sale in this State . . . ." ¶ 137.5.

Corp., the tender offeror, is a Delaware corporation with principal offices in Connecticut. Chicago Rivet is a publicly held Illinois corporation with shareholders scattered around the country, 27% of whom live in Illinois. MITE's offer to Chicago Rivet's shareholders, including those in Illinois, necessarily employed interstate facilities in communicating its offer, which, if accepted, would result in transactions occurring across state lines. These transactions would themselves be interstate commerce. Yet the Illinois law, unless complied with, sought to prevent MITE from making its offer and concluding interstate transactions not only with Chicago Rivet's stockholders living in Illinois, but also with those living in other States and having no connection with Illinois. Indeed, the Illinois law on its face would apply even if not a single one of Chicago Rivet's shareholders were a resident of Illinois, since the Act applies to every tender offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois. Ill. Rev. Stat., ch. 121½, ¶137.52–10(2) (1979). Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.

It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled. In *Shafer* v. *Farmers Grain Co.*, *supra*, at 199, the Court held that "a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." See also *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 806 (1976). The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has ef-

fects within the State. In *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 775 (1945), the Court struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control [conduct] beyond the boundaries of the state . . . ." The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer* v. *Heitner*, 433 U. S. 186, 197 (1977).

Because the Illinois Act purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the State, it must be held invalid as were the laws at issue in *Shafer* v. *Farmers Grain Co.* and *Southern Pacific*.

B

The Illinois Act is also unconstitutional under the test of *Pike* v. *Bruce Church, Inc.*, 397 U. S., at 142, for even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute. The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere.

The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced. See Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev.

1161, 1173–1174 (1981); Fischel, Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers, 57 Texas L. Rev. 1, 5, 27–28, 45 (1978); H. R. Rep. No. 94–1373, p. 12 (1976).

Appellant claims the Illinois Act furthers two legitimate local interests. He argues that Illinois seeks to protect resident security holders and that the Act merely regulates the internal affairs of companies incorporated under Illinois law. We agree with the Court of Appeals that these asserted interests are insufficient to outweigh the burdens Illinois imposes on interstate commerce.

While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law. We note, furthermore, that the Act completely exempts from coverage a corporation's acquisition of its own shares. Ill. Rev. Stat., ch. 121½, ¶ 137.52–9(4) (1979). Thus Chicago Rivet was able to make a competing tender offer for its own stock without complying with the Illinois Act, leaving Chicago Rivet's shareholders to depend only on the protections afforded them by federal securities law, protections which Illinois views as inadequate to protect investors in other contexts. This distinction is at variance with Illinois' asserted legislative purpose, and tends to undermine appellant's justification for the burdens the statute imposes on interstate commerce.

We are also unconvinced that the Illinois Act substantially enhances the shareholders' position. The Illinois Act seeks to protect shareholders of a company subject to a tender offer by requiring disclosures regarding the offer, assuring that shareholders have adequate time to decide whether to tender their shares, and according shareholders withdrawal, proration, and equal consideration rights. However, the Williams Act provides these same substantive protections, compare Ill. Rev. Stat., ch. 121½, ¶¶ 137.59.C, D, and E (1979) (with-

drawal, proration, and equal consideration rights), with 15 U. S. C. §§ 78n(d)(5), (6), and (7) and 17 CFR § 240.14d–7 (1981) (same). As the Court of Appeals noted, the disclosures required by the Illinois Act which go beyond those mandated by the Williams Act and the regulations pursuant to it may not substantially enhance the shareholders' ability to make informed decisions. 633 F. 2d, at 500. It also was of the view that the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management. We are unprepared to disagree with the Court of Appeals in these respects, and conclude that the protections the Illinois Act affords resident security holders are, for the most part, speculative.

Appellant also contends that Illinois has an interest in regulating the internal affairs of a corporation incorporated under its laws. The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands. See Restatement (Second) of Conflict of Laws § 302, Comment *b*, pp. 307–308 (1971). That doctrine is of little use to the State in this context. Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company. *Great Western United Corp.* v. *Kidwell*, 577 F. 2d, at 1280, n. 53; Restatement, *supra*, § 302, Comment *e*, p. 310. Furthermore, the proposed justification is somewhat incredible since the Illinois Act applies to tender offers for any corporation for which 10% of the outstanding shares are held by Illinois residents, Ill. Rev. Stat., ch. 121½, ¶ 137.52–10 (1979). The Act thus applies to corporations that are not incorporated in Illinois and have their principal place of business in other States. Illinois has no inter-

est in regulating the internal affairs of foreign corporations.

We conclude with the Court of Appeals that the Illinois Act imposes a substantial burden on interstate commerce which outweighs its putative local benefits. It is accordingly invalid under the Commerce Clause.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, concurring in part.

I agree with JUSTICE MARSHALL that this case is moot. In view, however, of the decision of a majority of the Court to reach the merits, I join Parts I and V–B of the Court's opinion.

I join Part V–B because its Commerce Clause reasoning leaves some room for state regulation of tender offers. This period in our history is marked by conglomerate corporate formations essentially unrestricted by the antitrust laws. Often the offeror possesses resources, in terms of professional personnel experienced in takeovers as well as of capital, that vastly exceed those of the takeover target. This disparity in resources may seriously disadvantage a relatively small or regional target corporation. Inevitably there are certain adverse consequences in terms of general public interest when corporate headquarters are moved away from a city and State.*

The Williams Act provisions, implementing a policy of neutrality, seem to assume corporate entities of substantially equal resources. I agree with JUSTICE STEVENS that the

*The corporate headquarters of the great national and multinational corporations tend to be located in the large cities of a few States. When corporate headquarters are transferred out of a city and State into one of these metropolitan centers, the State and locality from which the transfer is made inevitably suffer significantly. Management personnel—many of whom have provided community leadership—may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters.

Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include but often are broader than those of incumbent management.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

The question whether this case is moot depends on the effect of the preliminary injunction entered on February 2, 1979, restraining the Illinois Secretary of State from enforcing the Illinois Business Take-Over Act while the injunction remained in effect. If, as JUSTICE MARSHALL contends in his dissenting opinion, the injunction granted the MITE Corp. a complete immunity from state sanctions for any acts performed while the injunction was outstanding, I would agree that the case is moot. On the other hand, if the injunction did no more than it purported to do, setting aside the injunction would remove its protection and MITE would be subject to sanctions in the state courts. Those courts might regard the fact that an injunction was outstanding at the time MITE violated the Illinois statute as a defense to any enforcement proceeding, but unless the federal injunction was tantamount to a grant of immunity, there is no federal rule of law that would require the state courts to absolve MITE from liability. I believe, therefore, that to resolve the mootness issue—which, of course, is jurisdictional—we must answer the question that JUSTICE MARSHALL's dissent raises.

JUSTICE MARSHALL advances various reasons for adopting a rule that will give federal judges the power to grant complete immunity to persons who desire to test the constitutionality of a state statute. His proposed rule would treat any federal judge's preliminary injunction restraining enforcement of a state statute on federal grounds as a grant of immunity with respect to any conduct undertaken while the injunc-

tion was outstanding. Under the rule he proposes, "if the statute is later determined to be valid, the State will never be able to prosecute the individual that obtained the preliminary injunction for action taken while the injunction was in effect." *Post*, at 657, n. 1. For me, the question is not whether such a rule would be wise; the question is whether federal judges possess the power to grant such immunity. In my opinion they do not.

I

The essential facts of this case are few and bear repeating. On February 2, 1979, MITE Corp. and MITE Holdings, Inc., obtained a preliminary injunction restraining the Illinois Secretary of State from invoking the provisions of the Illinois Business Take-Over Act to block MITE's intended takeover of Chicago Rivet & Machine Co. Three days later, without complying with the provisions of the Illinois statute, MITE published its offer in the Wall Street Journal. On February 9, 1979, the District Court entered a judgment declaring the Illinois statute unconstitutional; the court permanently enjoined the Secretary from enforcing the Illinois statute against MITE.

The State contends that the attempted takeover was subject to the provisions of the Illinois statute and that MITE violated the Act by failing to register with the Illinois Secretary of State. The State further argues that the Take-Over Act is consistent with federal law. For purposes of deciding the mootness issue, we must assume that these contentions are correct; a holding that this case is moot would mean that MITE is completely protected from any adverse action whether or not the statute is unconstitutional. Such a conclusion would be possible only if the District Court's preliminary injunction granted MITE absolute and permanent immunity from any prosecution—civil or criminal—brought to enforce the Illinois statute.

Neither the terms of the preliminary injunction nor prior equity practice provides any support for an interpretation of

the District Court's order as a grant of total immunity from future prosecution. More fundamentally, federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments.

A

An injunction restrains conduct. Its effect is normally limited to the parties named in the instrument. Since a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully.[1] The bond, in effect, is the moving party's warranty that the law will uphold the issuance of the injunction.

These features of injunctive relief are inconsistent with a blanket grant of immunity, as this case demonstrates. The preliminary injunction did not purport to provide permanent immunity for violations of the statute that occurred during its effective period. It merely provided that the Secretary of State was enjoined from "issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act" against MITE. Record 16. It did not enjoin other parties who are authorized by the Act to enforce its provisions. Ill. Rev.

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[1] As provided by Federal Rule of Civil Procedure 65(c):

"No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

In Illinois damages apparently may be recovered for injuries caused by a preliminary injunction issued wrongfully by a state court even in the absence of an indemnity bond or abuse of process. See Ill. Rev. Stat., ch. 69, ¶ 12 (1979); Note, 73 Harv. L. Rev. 333, 347 (1959).

Stat., ch. 121½, ¶¶ 137.62, 137.64 (1979). Moreover, the preliminary injunction was entered without any declaration that the Illinois statute was unconstitutional. There simply is no basis on which to conclude that the preliminary injunction issued by the District Court should be construed as having granted MITE permanent immunity from future proceedings brought under the Illinois statute.

In *Steffel* v. *Thompson*, 415 U. S. 452, the Court unanimously held that an individual who wished to engage in "constitutionally protected activity" but was threatened with prosecution under a state criminal statute could obtain a declaratory judgment in federal court declaring the statute invalid. The Court did not suggest that, armed with such a judgment from a federal district court, the individual could violate the statute with impunity; indeed, it stated just the opposite:

> "'[A] federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute.'" *Id.*, at 469–470 (quoting *Perez* v. *Ledesma*, 401 U. S. 82, 124 (separate opinion of BRENNAN, J.)).[2]

JUSTICE WHITE attached possibly the greatest significance to a federal declaratory judgment, writing separately in *Steffel* that "I would anticipate that a final declaratory judgment entered by a federal court holding particular conduct of the federal plaintiff to be immune on federal constitutional grounds from prosecution under state law should be accorded res judicata effect in any later prosecution of that very conduct."

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[2] See also 415 U. S., at 480 (REHNQUIST, J., concurring) ("There is nothing in the [Declaratory Judgment] Act's history to suggest that Congress intended to provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct"); *id.*, at 482 ("A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions").

415 U. S., at 477 (concurring opinion). A declaratory judgment reversed on appeal, however, certainly would not have such res judicata effect.

An individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril. One purpose of the federal declaratory judgment statute is to permit such an individual to test the legality of a state statute before engaging in conduct that is prohibited by its terms. See S. Rep. No. 1005, 73d Cong., 2d Sess., 2–3 (1934). Recognition of this fact, however, does not determine the point at which an individual may act with absolute assurance that he may not be punished for his contemplated activity. The fact that a federal judge has entered a declaration that the law is invalid does not provide that assurance; every litigant is painfully aware of the possibility that a favorable judgment of a trial court may be reversed on appeal. To repeat the words of this Court in *Steffel*, the most that can be said is: "'If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute.'" 415 U. S., at 470 (quoting *Perez* v. *Ledesma*, *supra*, at 124 (separate opinion of BRENNAN, J.)).[3]

Since a final judgment declaring a state statute unconstitutional would not grant immunity for actions taken in reliance on the court's decision, certainly a preliminary injunction—which on its face does nothing more than temporarily restrain conduct—should not accomplish that result. Neither the

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[3] The fact that an unreviewed judgment does not provide absolute protection does not render the declaratory judgment of a district court or a court of appeals meaningless. As stated in *Steffel:*

"'Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew.'" 415 U. S., at 470 (quoting *Perez* v. *Ledesma*, 401 U. S., at 125 (separate opinion of BRENNAN, J.)).

preliminary injunction nor the subsequent judgment declaring the statute unconstitutional can fairly be construed as a grant of absolute immunity from enforcement of the Illinois statute.[4]

B

My conclusions concerning the proper nature of injunctive and declaratory relief are not based upon arcane interpreta-

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[4] In *Liner* v. *Jafco, Inc.*, 375 U. S. 301, the respondent obtained an injunction from a state court that restrained picketing at a construction site. Petitioners moved to dissolve the injunction on the ground that the state court was without jurisdiction to adjudicate the controversy because the subject matter of the picketing was exclusively within the cognizance of the National Labor Relations Board. Petitioners' motion was denied by the state court and that decision was affirmed on appeal. This Court granted a petition for certiorari.

While the case was pending in the state appellate court, construction at the site was completed. This Court nevertheless held that the issue of whether the injunction had issued properly was not moot because the respondent remained liable on an indemnity bond if the injunction had issued wrongfully. The Court stated:

"The petitioners plainly have 'a substantial stake in the judgment . . . ,' *Fiswick* v. *United States*, 329 U. S. 211, 222, which exists apart from and is unaffected by the completion of construction. Their interest derives from the undertaking of respondent Jafco, Inc., in the injunction bond to indemnify them in damages if the injunction was 'wrongfully' sued out. Whether the injunction was wrongfully sued out turns solely upon the answer to the federal question which the petitioners have pressed from the beginning. If the answer of the Tennessee Court of Appeals to that question may not be challenged here, the petitioners have no recourse against Jafco on the bond." *Id.*, at 305–306.

In this case it does not appear that MITE is liable on an injunction bond. The posting of an indemnity bond, however, merely creates a right of action—that may or may not otherwise exist—for damages caused during the period that a wrongfully issued injunction was in effect. In this case, such rights of action exist under an independent state law that we must presume to be valid. As in *Liner*, these rights of action may be pursued "if the injunction was 'wrongfully' sued out"; and "[w]hether the injunction was wrongfully sued out turns solely upon the answer to the federal question which the petitioners have pressed from the beginning."

tions of common law. Federal courts are courts of limited jurisdiction.[5] Before a federal court exercises any governmental power, it has a duty to determine its own jurisdiction to act. There simply is no constitutional or statutory authority that permits a federal judge to grant dispensation from a valid state law.[6]

As I have written before, the federal judiciary can continue to perform its vital function in our governmental structure only if it recognizes the limitations on its own legitimate authority. *United States* v. *New York Telephone Co.*, 434 U. S. 159, 178 (STEVENS, J., dissenting in part). A belief that a particular result appears reasonable or wise is an insufficient predicate for the exercise of federal judicial power.

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[5] As stated by Chief Justice Marshall in *Ex parte Bollman*, 4 Cranch 75, 93:

"As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disdains all jurisdiction not given by the constitution, or by the laws of the United States.

"Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied."

[6] I do not suggest that, if the state law is valid, a federal court lacks jurisdiction to enter an injunction restraining state officials from enforcing the statute. Such an injunction may be appropriate—and would be binding on the parties—to permit the federal court to preserve its jurisdiction pending a final decision on the constitutionality of the statute. *United States* v. *Mine Workers*, 330 U. S. 258, 289–290. "Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court." *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931. Such an injunction does not *continue* to be binding on the parties, however, if it is vacated on appeal; "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties *until it is reversed by orderly and proper proceedings.*" *United States* v. *Mine Workers*, *supra*, at 293 (emphasis added).

The District Court in this case entered both an injunction restraining certain conduct by the Illinois Secretary of State and a judgment declaring a state statute unconstitutional. It did not—because it could not—grant immunity from the requirements of a valid state law.[7] As a result, this Court has jurisdiction to consider whether the judgment and relief entered by the District Court were proper.[8]

II

On the merits, I agree with the Court that the Illinois Take-Over Act is invalid because it burdens interstate com-

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[7] A conflict between a federal rule of law and a state statute may nullify the state law. Although such invalidity may not be recognized or accepted until it is identified in litigation, in my opinion the conflict with a paramount rule of federal law nullifies a state law whether or not litigation is ever commenced. In other words, it is federal rules of law—and not the actions of federal judges—that may render a state law invalid.

[8] JUSTICE REHNQUIST concludes that this case is moot because the injunction restrains an enforcement proceeding that has not yet begun. If his view were accepted, an injunction against a threatened criminal proceeding, see *Dombrowski* v. *Pfister*, 380 U. S. 479, would never be appropriate, for the controversy between the parties would not yet be "ripe." MITE sought an injunction not only to prevent the Illinois Secretary of State from interfering with its attempted takeover of Chicago Rivet, but also to bar the Secretary from proceeding against MITE for actions taken in violation of the statute. What is critical to the mootness question in this case is not that MITE abandoned the takeover before it was completed, but that MITE engaged in conduct that violated the terms of the Illinois statute. The *extent* of MITE's violation of state law cannot be determinative of its interest in avoiding an enforcement proceeding based on what MITE believed was constitutionally protected activity.

Oil Workers v. *Missouri*, 361 U. S. 363, relied on by JUSTICE REHNQUIST, does not compel a contrary result. In that case, the party subject to the injunction terminated the activity that had been enjoined. As a result, this Court refused to consider whether the injunction had issued properly, even though a resolution of that question would also have resolved other matters—based on similar questions of law—pending in another proceeding between the same parties. In this case, the party subject to the injunction—the Illinois Secretary of State—has not abandoned his desire to do what the injunction currently restrains him from doing.

merce. I therefore join Part V of its opinion. I am not persuaded, however, that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management. Accordingly, although I agree with the Court's assessment of the impact of the Illinois statute, I do not join its pre-emption holding.

JUSTICE O'CONNOR, concurring in part.

I agree with the Court that the case is not moot, and that portions of the Illinois Business Take-Over Act, Ill. Rev. Stat., ch. 121½, ¶ 137.51 *et seq.* (1979), are invalid under the Commerce Clause. Because it is not necessary to reach the pre-emption issue, I join only Parts I, II, and V of the Court's opinion, and would affirm the judgment of the Court of Appeals on that basis.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The jurisdiction of this Court depends upon the existence of a live controversy. We may resolve a particular dispute only if the parties have a real interest in the outcome of that dispute. Otherwise, the case is moot, and must be dismissed. *Roe* v. *Wade*, 410 U. S. 113, 125 (1973); *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403, 407 (1972). In my view, this case should have been dismissed. The parties to this appeal have no adversary interest in the outcome of this case. Their positions would be the same whether the Court approved the Illinois Business Take-Over Act or struck it down. Because the Court finds that the Illinois Act is unconstitutional, there will be no further litigation. However, even if the Court had held that the Illinois Act is constitutional, and had lifted the permanent injunction that now restrains enforcement of the Act against MITE, there would be no basis for continued litigation. The Secretary stated that if the decision below were reversed, he would initiate enforcement proceedings against MITE in

state court, seeking civil and criminal penalties for its failure to comply with the Illinois Act. But a preliminary injunction was in effect at the time the alleged violations occurred. As I explain below, I believe that this injunction would have barred the Secretary from seeking either civil or criminal penalties for violations of the Act that occurred during that period. MITE would have a complete defense to such an action.

I

The Secretary argues that the case is not moot because the preliminary injunction would not be a complete defense to a state enforcement action. He contends that the preliminary injunction merely barred him from commencing an enforcement action during the period the injunction was in effect. Thus, if this Court had decided that the statute is constitutional and had lifted the permanent injunction, the State would have been able to commence an action seeking penalties for any violations that occurred during the period the preliminary injunction was in effect. In other words, argues the Secretary, the preliminary injunction only provided temporary security. It enabled MITE to go forward with the tender offer—subject to the risk that at some later stage, the constitutionality of the statute would be upheld, and the State would commence enforcement proceedings.

Federal courts undoubtedly have the power to issue a preliminary injunction that restrains enforcement of a state statute, subject to the condition that if the statute is later found to be valid, the State is free to seek penalties for violations that occurred during the period the injunction was in effect. In my view, however, federal courts also have the power to issue a preliminary injunction that offers permanent protection from penalties for violations of the statute that occurred during the period the injunction was in effect.[1] Determining

[1] Unless the federal courts can grant preliminary injunctions that provide permanent protection, challenges to questionable state statutes may be de-

whether a particular injunction provides temporary or permanent protection becomes a question of interpretation.

I believe that in the ordinary case, unless the order contains specific language to the contrary, it should be presumed that an injunction secures permanent protection from penalties for violations that occurred during the period it was in effect; the burden should be on the State to show that the injunction provided only temporary security.[2] A presumption

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terred. A state statute may be either repugnant to the Constitution, or pre-empted by some federal law. Parties who wish to engage in conduct proscribed by state statutes may be reluctant to challenge their validity unless they can obtain permanent immunity from penalties. But there is a strong federal interest in encouraging such challenges: the Constitution itself provides that the Constitution and federal statutes shall be "the supreme Law of the Land." Grants of permanent immunity help ensure that federal law will remain paramount.

Holding that federal courts have power to grant permanent protection would not substantially limit state power. In fact, the impact on state power will be relatively insignificant. A federal court may grant a preliminary injunction prohibiting the enforcement of a state statute only when there is substantial doubt about the validity of the statute, and when the party seeking relief is able to show that he will suffer irreparable injury if an injunction is not granted. It is true that under the rule I propose, if the statute is later determined to be valid, the State will never be able to prosecute the individual that obtained the preliminary injunction for action taken while the injunction was in effect. However, the State will be free to prosecute him for actions occurring either before or after the injunction, and will also be able to prosecute other persons who violated the statute. In other words, the State will be barred only from prosecuting the particular individual who requested the injunction for conduct undertaken during the pendency of the injunction. Moreover, it will be barred from prosecuting that individual, only because there was serious doubt about the constitutionality of the statute, and because he was able to show that he would suffer irreparable injury if an injunction was not granted.

[2] It might be argued that because a party seeking a preliminary injunction must ordinarily post bond, there should be a presumption in favor of recovery of damages caused by a wrongfully issued preliminary injunction. However, the fact that an injunction bond is ordinarily required does not necessarily imply that the party against whom the injunction was issued is automatically entitled to damages. That party must still prové that dam-

in favor of permanent protection is likely to reflect the intentions of the court that granted the motion. In acting upon a request for an injunction, it will recognize that short-term protection is often only marginally better than no protection at all. Parties seek to restrain the enforcement of a state statute, not just because they want short-term protection, but because they desire permanent immunity for actions they take in reliance on the injunction. If they are contemplating action that might violate a state statute, they will take little solace from temporary immunity—when they know that if they decide to act, enforcement proceedings might be initiated at some later stage.[3]

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ages are appropriate; the injunction bond merely provides security, when the party is able to make such a showing.

It is true that when an injunction bond has been posted, and when the party challenging the injunction has a right to recover damages on the bond, the question whether an injunction was properly issued is not moot. See *Liner* v. *Jafco, Inc.*, 375 U. S. 301 (1964). The District Court record does not reveal that a bond was posted in this case. Even if a bond had been posted, however, this case would probably be moot; I believe that the State would not have a cause of action for damages. If this Court had determined that the injunction was wrongfully entered, the State might argue that it was damaged because it was unable to recover penalties for violations of the Take-Over Act that occurred during the period the preliminary injunction was in effect. Such an argument should not prevail. Lost penalties do not constitute the sort of damages recoverable on a bond. In any event, as I suggest in this dissent, I believe that the preliminary injunction should be interpreted as protecting MITE from penalties. Thus, it should also protect MITE from liability for "damages" sustained by the State because it could not bring an action for penalties.

If a bond had been posted, the State might be able to recover costs or nominal damages on the bond. However, where there is no other basis for challenging the validity of an injunction, the possibility of such recovery is not sufficient to keep a case alive. If it were, then almost no case challenging an injunction could become moot. See *Washington Market Co.* v. *District of Columbia*, 137 U. S. 62 (1890) (court costs); *Hernandez* v. *European Auto Collision, Inc.*, 487 F. 2d 378, 387 (CA2 1973) (nominal damages); *Kerrigan* v. *Boucher*, 450 F. 2d 487 (CA2 1971) (nominal damages).

[3] Cf. *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974) (federal-court intervention is appropriate where the applicant for relief is situated "between

Here, the preliminary injunction does not expressly state that it provides permanent immunity from penalties for violations of the Illinois Act that may occur during its effective period. The injunction provides only that the Secretary of State is enjoined from "issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act" against MITE. Record 16. However, I see no reason why the presumption in favor of permanent protection should not be applied here. In this context, as the District Court must have recognized, permanent protection was needed. MITE sought an injunction, not just because it desired protection from enforcement actions during the period it was actually making the tender offer, but also because it desired protection from such actions in the future. The Act provides for substantial civil and criminal penalties. MITE would have been reluctant to go forward with its offer, which entailed considerable expense, if there were some risk that it would be penalized later. Indeed, in the Schedule 14D–1 filed with the SEC, MITE expressly stated that it would not commence the tender offer unless it obtained injunctive relief. It also reserved the right to withdraw its offer if injunctive relief were initially granted, but later withdrawn. See Record, Plaintiff's Exhibit 14.[4]

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the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding"). See also *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500 (1925); *Terrace* v. *Thompson*, 263 U. S. 197, 216 (1923); *Salem Inn, Inc.* v. *Frank*, 501 F. 2d 18, 21 (CA2 1974), aff'd in relevant part *sub nom. Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975).

[4] I also find it significant that the District Court's final order granting a permanent injunction declares that the Illinois Act is "null and void and of no force and effect." App. to Juris. Statement 41a. A reasonable construction of the order granting a preliminary injunction is that it was also intended to render the act "null and void" while the injunction was in effect.

Interpreting the injunction to provide permanent protection also ensures that MITE could never be penalized for acting in reliance on the injunction.[5] MITE went forward with the tender offer, reasonably believing that the District Court's order provided complete immunity. Under the circumstances, it would be improper to permit the State to penalize action taken while the injunction was in effect. In the past, this Court has recognized that reasonable reliance on judicial pronouncements may constitute a valid defense to criminal prosecution. See, *e. g.*, *Marks* v. *United States*, 430 U. S. 188 (1977).[6]

In addition to arguing that the preliminary injunction should be interpreted to provide only temporary protection from a state enforcement action, the Secretary argues that resolution of the mootness issue in this case should be controlled by *Leroy* v. *Great Western United Corp.*, 443 U. S. 173 (1979). In that case, Great Western announced its intention to make a tender offer to purchase stock in another corporation. Idaho officials responsible for administering an Idaho statute governing corporate takeovers, see Idaho Code § 30–1501 *et seq.* (1980), objected to the offer and delayed its effective date. Great Western brought an action in

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[5] It is relevant to note that although MITE sought injunctive relief prior to engaging in any action that could subject it to civil or criminal penalties, the State never sought a stay of the District Court's injunction either in that court or in the Court of Appeals, and never expressed an intent to do so.

[6] In *Marks*, a conviction for transporting obscene materials was overturned, where the materials were not obscene at the time of transportation, but were rendered obscene at the time of trial by an intervening decision of this Court. See also *Cox* v. *Louisiana*, 379 U. S. 559, 569–571 (1965) (conviction for illegal picketing reversed where defendant had relied on permission from police officer); *Raley* v. *Ohio*, 360 U. S. 423, 437–439 (1959) (conviction for refusal to testify before state commission reversed because witness had relied on opinion of commission chairman that he was privileged to remain silent); *United States* v. *Mancuso*, 139 F. 2d 90 (CA3 1943) (defendant could not be held liable for ignoring induction notices issued while *ex parte* order staying induction was in effect).

Federal District Court, seeking a declaration that the Idaho takeover law was unconstitutional, and an injunction restraining Idaho officials from enforcing the statute. The District Court granted injunctive relief that enabled Great Western to complete the acquisition. This Court, in reviewing the case, held that the controversy was not moot. "[T]he question whether Great Western has violated Idaho's statute will remain open unless and until the District Court's judgment is finally affirmed." *Id.*, at 178.[7]

Leroy v. *Great Western United Corp.* is easily distinguishable from this case. Unlike MITE, Great Western took actions that might have violated the state takeover statute before it obtained injunctive relief. If this Court had decided that the Idaho statute was valid, Idaho officials might have been able to seek penalties for those preinjunction violations.[8] *Leroy* v. *Great Western United Corp.* can also be distinguished on the ground that the takeover offer in that case was successful. If the Idaho statute had been found to be valid, then Idaho officials would have been able to seek a rescission of the takeover.[9] Here, since the acquisition was never completed, Illinois officials could not seek rescission.[10]

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[7] The Court did not reach the question whether the Idaho statute was unconstitutional. It concluded that the action should have been dismissed on grounds of improper venue.

[8] See Idaho Code §§ 30–1502 to 30–1504, 30–1510 (1980).

[9] See Idaho Code § 30–1509 (1980) (allowing State to institute action for rescission). The Illinois Act also empowers the State to seek a court order rescinding sales that are unlawful under the Act. Ill. Rev. Stat., ch. 121½, ¶ 137.62 (1979).

[10] It is true that a rescission action would have been predicated on acts that were taken under cover of the preliminary injunction. However, I believe that injunctions should ordinarily be interpreted only as providing permanent protection from *penalties*. The State should be barred from penalizing the offeror for acts that took place during the period the injunction was in effect. However, if a court determines that the state statute is valid, the State should be free to provide a remedy for the continuing effects of acts that violated the statute. In particular, a State should be permitted to dismantle a successful acquisition that violated a valid statute.

Finally, this case does not fall within the exception to the mootness doctrine for cases that "are capable of repetition, yet evading review." Unless a class action is involved, that exception applies only when the challenged action is too short to be fully litigated before its cessation, and when there is a reasonable expectation or a demonstrated probability that the same complaining party will be subject to the same action in the future. *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 187 (1979); *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975). The second requirement has not been satisfied here. MITE has agreed not to renew its efforts to acquire Chicago Rivet. Thus, unless MITE breaches its agreement,[11] the State will never again have occasion to prevent MITE from making a takeover offer for Chicago Rivet. In addition, there has been no showing that MITE plans to acquire another corporation with substantial connection to Illinois. Thus, there is no demonstrated probability that the State will have occasion to prevent MITE from making a takeover offer for some other corporation.

II

The majority disposes of the mootness issue in a short paragraph. It concedes that the only possible basis for continued litigation in this case would be a state action for penalties. It further concedes that the preliminary injunction issued by the District Court may be a complete defense to an action for civil or criminal penalties. It argues, however, that the effect to be given the preliminary injunction should not be reached in this case. Rather, that question should be decided in a state enforcement action, if it is raised as a defense. Thus, contends the majority, the case is not moot.

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[11] The possibility that MITE will breach its agreement does not bring this case within the "capable of repetition, yet evading review" exception. The likelihood that such a breach will occur is relatively small. The exception applies only when there is a reasonable expectation that the same action will occur in the future.

I am completely unpersuaded by the majority's facile analysis. In deciding whether a case is moot, the Court must determine whether there is a live controversy. There is a live controversy in this case only if the State could seek penalties from MITE. Here, the State could not seek penalties from MITE. It may be true that the State could file a complaint if this Court were to lift the permanent injunction. However, this fact is not enough to keep the case alive where, as a matter of federal law, the complaint *must* be dismissed. If the action that the State plans to commence in state court lacks any merit—if MITE has an automatic defense to that action—then there simply is no controversy.

This case is made more difficult because the Court has never before decided what effect should be given to preliminary injunctions. But the fact that we must decide a novel question does not make the case any less moot. Certainly, if the Court had already held that a preliminary injunction provides permanent immunity, the case would be moot even though the State could go into state court and seek penalties. Such a suit, which would be clearly frivolous, could not keep the dispute alive.

The Court's refusal to confront the question whether a preliminary injunction would provide a complete defense is particularly ironic, given its recent decision in *Lane* v. *Williams*, 455 U. S. 624 (1982). Respondents in that case had pleaded guilty in unrelated Illinois state-court prosecutions for burglary, an offense punishable by imprisonment and a mandatory 3-year parole term. Neither respondent was informed during his plea acceptance hearing that the negotiated sentence included the mandatory parole term. Each respondent completed his prison sentence but was reincarcerated for parole violation. While in custody, they filed petitions for federal habeas corpus, alleging that their guilty pleas were invalid because they were not informed of the mandatory parole requirement. The District Court decided to enter an order declaring the parole term void, and the United States

Court of Appeals for the Seventh Circuit affirmed. By the time the cases reached this Court, both respondents had completed their sentences, and their parole terms had expired. This Court held that the claims for relief were moot. In reaching this conclusion, the Court determined that as a matter of Illinois law, no collateral consequences would flow from the parole revocations. Thus, there would be no point in declaring the parole terms void. In other words, the Court reached out to decide a question of state law in order to hold that the case was moot. Here, by contrast, the Court refuses to confront an important question of *federal* law—deciding instead that the question should be left to a state court—so that it can avoid holding that the case is moot.

III

The parties to this appeal have no adversary interest in the resolution of the merits of this controversy. The majority acts without jurisdiction when it addresses the question whether the Illinois Business Take-Over Act is constitutional. Because I believe the case is moot, I would have vacated the judgment of the Court of Appeals, with instructions that it remand the case to the District Court with instructions to dismiss.

JUSTICE REHNQUIST, dissenting.

I agree with JUSTICE MARSHALL that this case does not present a justiciable controversy, but for a different reason.

MITE obtained an injunction in order to effect a cash tender offer for the stock of Chicago Rivet. The injunction restrained the Illinois Secretary of State from interfering with the Chicago Rivet tender offer by enforcing the Illinois Business Take-Over Act against MITE. Three days after the District Court issued a permanent injunction, MITE and Chicago Rivet reached an agreement and MITE withdrew its extant offer. Approximately one month later, MITE announced its decision not to make any tender offer. MITE is

not presently engaging in activity that is regulated by the Illinois statute, and there is no indication that MITE intends to engage in any such activity in the future. Therefore, the facts that gave rise to *this controversy* over the constitutionality of Illinois' anti-takeover statutes no longer exist, and it is unlikely that they will be repeated in the future. As the tender offer has met its demise for reasons having nothing to do with the validity of the Illinois statute, the injunction is no longer necessary to accomplish the purposes for which it was obtained. MITE no longer needs an injunction in order to effect a tender offer for the shares of Chicago Rivet or any other corporation subject to the Illinois Act. Nor does MITE need the injunction in order to preclude the Secretary from rescinding a completed tender offer.

Despite these developments which have occurred after the District Court issued the injunction, the Court concludes that the present controversy between the Illinois Secretary of State and MITE over the constitutionality of the Illinois Business Take-Over Act is not moot. According to the Court, the Illinois Secretary of State's intention to bring an enforcement action against MITE keeps the present controversy alive. The possibility of a future enforcement action, however, is insufficient for me to conclude that the controversy that is before the Court is not moot.[1]

This Court has no power over a suit not pending before it. "'Our power only extends over and is limited by the conditions of the case now before us.'" *Oil Workers* v. *Missouri*, 361 U. S. 363, 370 (1960), quoting *American Book Co.* v. *Kansas ex rel. Nichols*, 193 U. S. 49, 52 (1904). A case pending in this Court may not be kept alive simply because similar or identical issues are currently ripe for decision in a controversy between the same parties in another court. See *Oil*

[1] This case is unlike those in which this Court has found justiciable an action to enjoin a threatened criminal prosecution. The plaintiff in the present posture of this case no longer intends to engage in, or is presently engaging in, what is asserted to be federally protected activity.

Workers v. *Missouri*, *supra*, at 370–371; *American Book Co.* v. *Kansas ex rel. Nichols*, *supra*, at 51. *A fortiori*, this case may not be kept alive simply because there may exist a presently unripened controversy between these same parties over the constitutionality of the same Act. This is so even if our resolution of the merits of the instant case will resolve certain defenses that MITE could raise in an enforcement action were one to be brought by the Secretary. It follows that this case is not alive simply because a decision on the merits in this case will determine whether or not the Secretary's threatened enforcement action may ever ripen into a live controversy.

If an enforcement action were brought by the Secretary, "there is no way to know what the outcome of such a proceeding in the [Illinois] courts might be." *Oil Workers* v. *Missouri*, *supra*, at 371. The Illinois courts may well conclude that the injunction constitutes a defense either on state law grounds or upon the grounds suggested by JUSTICE MARSHALL in his dissent. The Illinois courts may also agree with MITE that the Business Take-Over Act is pre-empted by the Williams Act or that Illinois' regulation of interstate tender offers runs afoul of the Commerce Clause. The possibility that this Court might disagree with the Illinois courts' ultimate resolution of the issues arising in a presently unripe, but threatened, enforcement action hardly justifies the Court's resolution of important constitutional issues in the abstract posture in which they are currently presented.[2]

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[2] *Bus Employees* v. *Missouri*, 374 U. S. 74 (1963), and *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974), are clearly distinguishable. In each case, subsequent developments did not moot the controversy because the challenged statute affected the *challenging party's* current or planned activities. There is no suggestion in the instant case that the Illinois Business Take-Over Act has such an effect on MITE. Nor do I believe that this case remains alive merely because it is the enjoined party who seeks appellate review. Otherwise, an enjoined party could always litigate the legal bases for the injunction even though the party who sought

The Secretary and MITE dispute the propriety of the injunction issued by the District Court in this case only with respect to a controversy that may ripen in another court. Because the controversy that is before the Court is no longer alive, I would vacate the judgment of the Court of Appeals and order that court to remand this case to the District Court with instructions to dismiss the complaint. See *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950).

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the injunction no longer needs the injunction for the purposes for which it was obtained. Cf. *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981).

FOREMOST INSURANCE CO. ET AL. *v.* RICHARDSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80–2134. Argued January 12, 1982—Decided June 23, 1982

An action to recover for the death of an occupant of a pleasure boat resulting from a collision with another pleasure boat on a river in Louisiana was instituted in Federal District Court on the asserted basis of admiralty jurisdiction under 28 U. S. C. § 1333(1). The court dismissed the complaint, holding that there must be some relationship with traditional maritime activity for an injury sustained on navigable water to fall within federal admiralty jurisdiction, and that *commercial* maritime activity (not present here) is necessary to satisfy this relationship. The Court of Appeals reversed.

Held: In light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat, a complaint alleging a collision between two vessels—including pleasure boats–on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts. The holding in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249, that claims arising from airplane accidents, although occurring in a maritime locality, are cognizable in admiralty only when the wrong bears a significant relationship to traditional maritime activity also applies to determinations of federal admiralty jurisdiction outside the context of aviation torts. However, there is no requirement that the maritime activity be an exclusively commercial one. The federal interest in protecting maritime commerce can be fully vindicated only if *all* operators of vessels on navigable waters—not just individuals actually *engaged* in commercial maritime activity—are subject to uniform rules of conduct. This interpretation is consistent with congressional activity as to legislation governing "vessels" without regard to whether they engage in commercial activity. Pp. 672–677.

641 F. 2d 314, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dis-

senting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 677.

Arthur H. Andrews argued the cause and filed a brief for petitioners.

Dorsey C. Martin III argued the cause and filed a brief for respondents.

JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented in this case is whether the collision of two pleasure boats on navigable waters falls within the admiralty jurisdiction of the federal courts. See 28 U. S. C. § 1333. We granted certiorari to resolve the confusion in the lower courts respecting the impact of *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249 (1972), on traditional rules for determining federal admiralty jurisdiction. 454 U. S. 813 (1981). The United States Court of Appeals for the Fifth Circuit held that an accident between two vessels in navigable waters bears a sufficient relationship to traditional maritime activity to fall within federal admiralty jurisdiction. We affirm.

I

Two pleasure boats collided on the Amite River in Louisiana, resulting in the death of Clyde Richardson. The wife and children of the decedent brought this action in the United States District Court for the Middle District of Louisiana, alleging, *inter alia*, that petitioner Shirley Eliser had negligently operated the boat that collided with the vessel occupied by the decedent.[1] Respondents also named petitioner

[1] The wife and children of the decedent also named respondent June Allen as a defendant. They alleged that Allen was operating the vessel at the time of the collision, and that the decedent's death was caused by either the negligence of Allen or that of petitioner Eliser. Allen counterclaimed, alleging that the decedent had been operating the boat, and that her injuries were caused by his negligence. The factual dispute concern-

Foremost Insurance Co., Eliser's insurer, as a defendant. Jurisdiction was claimed under 28 U. S. C. § 1333(1), which gives federal district courts exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." Petitioners moved to dismiss, arguing that the complaint did not state a cause of action within the admiralty or maritime jurisdiction of the District Court.

In ruling on petitioners' motion, the District Court found the following facts to be undisputed:[2]

> "(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;
>
> "(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;
>
> "(3) Neither boat had ever been used in any 'commercial maritime activity' before the accident;
>
> "(4) At the time of the accident neither boat was involved in any 'commercial maritime activity' of any sort;
>
> "(5) Neither of the two drivers of the boat were being paid to operate the boat nor was this activity in any way a part of their regular type of employment;
>
> "(6) None of the passengers on either boat were engaged

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ing whether the decedent or Allen was operating the boat is irrelevant to the jurisdictional issue. However, because of the divergent interests and claims of respondent Allen and the respondent family of the decedent below, we refer only to the decedent's family when we use the term "respondents" throughout this opinion.

[2] The District Court assumed that the Amite River is navigable at the site of the collision. Although the issue is not free from doubt, it appears from the opinion and the disposition of the Court of Appeals that the court found that the river is navigable at this site although seldom, if ever, used for commercial traffic. This opinion is premised on our understanding that the river at this point is navigable, see Brief for Petitioners 20, but we leave open the question whether petitioners have preserved the opportunity to argue this issue upon further development of facts in the District Court.

in any kind of 'traditional maritime activity' either before or at the time of the accident;

"(7) Neither of the boats involved were under hire in any traditional maritime form;

"(8) There is no evidence to indicate that any 'commercial activity', even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as 'purely pleasure craft', not in any way 'involved in commerce', and,

"(9) There was no other instrumentality involved in this accident that had even a minor relationship to 'admiralty' or 'commerce', *i. e.* a buoy, barge, oil drilling apparatus, etc." 470 F. Supp. 699, 700 (1979).

After reviewing decisions of this Court and the Fifth Circuit, as well as relevant commentary, the District Court found that there must be some relationship with traditional maritime activity for an injury sustained on navigable water to fall within federal admiralty jurisdiction. The District Court held that commercial maritime activity is necessary to satisfy this relationship, and granted petitioners' motion to dismiss the complaint for lack of subject-matter jurisdiction because the collision of these two pleasure boats did not involve any commercial activity.

The Court of Appeals reversed. 641 F. 2d 314 (1981). The Court of Appeals agreed that *Executive Jet*, *supra*, and relevant Fifth Circuit decisions establish that "admiralty jurisdiction requires more than the occurrence of the tort on navigable waters—that additionally there must be a significant relationship between the wrong and traditional maritime activity." 641 F. 2d, at 315. It disagreed with the District Court, however, on the application of this principle to the undisputed facts of this case. Relying on the fact that the "Rules of the Road" govern all boats on navigable waters, and on the uncertainty that would accompany a finding of no admiralty jurisdiction in this case, the Court of Appeals held

that "two boats, regardless of their intended use, purpose, size, and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters." *Id.*, at 316.[3]

II

Prior to our opinion in *Executive Jet*, there was little question that a complaint such as the one filed here stated a cause of action within federal admiralty jurisdiction. Indeed, the *Executive Jet* Court begins its opinion by observing that, under the traditional rule of admiralty jurisdiction, "[i]f the wrong occurred on navigable waters, the action is within admiralty jurisdiction." 409 U. S., at 253 (citing *Thomas* v. *Lane*, 23 F. Cas. 957, 960 (No. 13,902) (CC Me. 1813) (Story, J., on Circuit). See also *The Plymouth*, 3 Wall. 20, 36 (1866) ("Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance"). Under this rule, an action arising out of a collision between two pleasure boats on navigable waters clearly falls within the admiralty jurisdiction of the district courts. When presented with this precise situation in the past, this Court has found it unnecessary even to discuss whether the district court's admiralty jurisdiction had been properly invoked, instead assuming the propriety of such jurisdiction merely because the accident occurred on navigable waters. *Levinson* v. *Deupree*, 345 U. S. 648, 651 (1953). See also *Just* v. *Chambers*, 312 U. S. 383 (1941) (injury to guest from carbon monoxide poisoning in the cabin of a pleasure boat). Cf. *Coryell* v. *Phipps*, 317 U. S. 406 (1943). In light of these decisions, we address here only the narrow question whether *Executive Jet* disapproved these earlier decisions *sub silentio*.

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[3] Judge Thornberry, concurring in part and dissenting in part, argued that federal admiralty jurisdiction could not be sustained if the river at the site of the accident, although navigable, did not also function as an integral or major "artery of commerce." 641 F. 2d, at 317.

In *Executive Jet*, this Court held that a suit for property damage to a jet aircraft that struck a flock of sea gulls upon takeoff and sank in the navigable waters of Lake Erie did not state a claim within the admiralty jurisdiction of the district courts. In reaching this conclusion, the Court observed that the mechanical application of the locality rule as the sole test for determining whether there is admiralty jurisdiction had been widely criticized by commentators, and that the federal courts and Congress had been compelled to make exceptions to this approach in the interests of justice in order to include certain torts with no maritime locality. The Court determined that claims arising from airplane accidents are cognizable in admiralty only when the wrong bears a significant relationship to traditional maritime activity. 409 U. S., at 268. Given the realities of modern-day air travel, the *Executive Jet* Court held that, "in the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." *Id.*, at 274.

The express holding of *Executive Jet* is carefully limited to the particular facts of that case. However, the thorough discussion of the theoretical and practical problems inherent in broadly applying the traditional locality rule has prompted several courts and commentators to construe *Executive Jet* as applying to determinations of federal admiralty jurisdiction outside the context of aviation torts. See, *e. g.*, *Kelly* v. *Smith*, 485 F. 2d 520 (CA5 1973); Calamari, The Wake of Executive Jet—A Major Wave or a Minor Ripple, 4 Maritime Law. 52 (1979). We believe that this is a fair construction. Although *Executive Jet* addressed only the unique problems associated with extending admiralty jurisdiction to aviation torts, much of the Court's rationale in rejecting a strict locality rule also applies to the maritime context. Indeed, the *Executive Jet* Court relied extensively on admiralty and maritime decisions of this Court and on congressional action ex-

tending admiralty jurisdiction to torts with a significant relationship to traditional maritime activity, but with no maritime locality.[4]

We recognize, as did the Court of Appeals, that the *Executive Jet* requirement that the wrong have a significant connection with traditional maritime activity is not limited to the aviation context. We also agree that there is no requirement that "the maritime activity be an exclusively commercial one." 641 F. 2d, at 316. Because the "wrong" here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court.

We are not persuaded by petitioners' argument that a substantial relationship with commercial maritime activity is necessary because commercial shipping is at the heart of the traditional maritime activity sought to be protected by giving the federal courts exclusive jurisdiction over all admiralty suits. This argument is premised on the faulty assumption that, absent this relationship with *commercial* activity, the need for uniform rules to govern conduct and liability disappears, and "federalism" concerns dictate that these torts be litigated in the state courts.

Although the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce, petitioners take too narrow a view of the federal interest sought to be protected. The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdic-

[4] In addition to noting these examples where strict application of the locality rule would have deprived the courts of admiralty jurisdiction despite a clear connection to maritime activity, the Court noted the difficulties of extending jurisdiction to torts with a maritime locality, but absolutely no connection to maritime activity. See 409 U. S., at 255–256 (disapproving decisions sustaining admiralty jurisdiction over claims by swimmers injured by other swimmers or submerged objects in shallow waters near shore); *id.*, at 256–257 (approving decisions requiring some connection with traditional maritime activity).

tion is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. For example, if these two boats collided at the mouth of the St. Lawrence Seaway, there would be a substantial effect on maritime commerce, without regard to whether either boat was actively, or had been previously, engaged in commercial activity. Furthermore, admiralty law has traditionally been concerned with the conduct alleged to have caused this collision by virtue of its "navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters." *Executive Jet*, 409 U. S., at 270. The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation,[5] compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

Yet, under the strict commercial rule proffered by petitioners, the status of the boats as "pleasure" boats, as opposed to "commercial" boats, would control the existence of admiralty jurisdiction. Application of this rule, however, leads to inconsistent findings or denials of admiralty jurisdiction similar to those found fatal to the locality rule in *Executive Jet*. Under the commercial rule, fortuitous circum-

[5] Not every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction. In *Executive Jet*, for example, we concluded that the sinking of the plane in navigable waters did not give rise to a claim in admiralty even though an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity. However, when this kind of potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of the boats in this case, admiralty jurisdiction is appropriate.

stances such as whether the boat was, or had ever been, rented, or whether it had ever been used for commercial fishing, control the existence of federal-court jurisdiction. The owner of a vessel used for both business and pleasure might be subject to radically different rules of liability depending upon whether his activity at the time of a collision is found by the court ultimately assuming jurisdiction over the controversy to have been sufficiently "commercial." We decline to inject the uncertainty inherent in such line-drawing into maritime transportation. Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities. Adopting the strict commercial rule would frustrate the goal of promoting the smooth flow of maritime commerce, because the duties and obligations of noncommercial navigators traversing navigable waters flowing through more than one State would differ "depending upon their precise location within the territorial jurisdiction of one state or another." 641 F. 2d, at 316.

Finally, our interpretation is consistent with congressional activity in this area. First, Congress defines the term "vessel," for the purpose of determining the scope of various shipping and maritime transportation laws, to include all types of waterborne vessels, without regard to whether they engage in commercial activity. See, *e. g.*, 1 U. S. C. § 3 ("'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"). Second, the federal "Rules of the Road," designed for preventing collisions on navigable waters, see, *e. g.*, 94 Stat. 3415, 33 U. S. C. § 2001 *et seq.* (1976 ed., Supp. IV), apply to all vessels without regard to their commercial or noncommercial nature.[6] Third, when it ex-

[6] Petitioners argue that admiralty jurisdiction in the federal courts is unnecessary to ensure the uniform application of the Rules of the Road to boat navigation because state courts are bound by the construction federal courts give to statutes relating to navigation. Assuming that petitioners

tended admiralty jurisdiction to injuries on land caused by ships on navigable waters, Congress directed that "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury . . *caused by a vessel on navigable water*. . . ." Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U. S. C. § 740.[7]

In light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat, we hold that a complaint alleging a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts. Therefore, the judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

No trend of decisions by this Court has been stronger—for two decades or more—than that toward expanding federal jurisdiction at the expense of state interests and state-court jurisdiction. Of course, Congress also has moved steadily and expansively to exercise its Commerce Clause and preemptive power to displace state and local authority. Often decisions of this Court and congressional enactments have been necessary in the national interest. The effect, never-

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are correct, this fact does not negate the importance that Congress has attached to the federal interest in having all vessels operating on navigable waters governed by uniform rules and obligations, which is furthered by consistent application of federal maritime legislation under federal admiralty jurisdiction.

[7] We refer to this language only to demonstrate that Congress did not require a commercial-activity nexus when it extended admiralty jurisdiction. We express no opinion on whether this Act could be construed to provide an independent basis for jurisdiction.

theless, has been the erosion of federalism—a basic principle of the Constitution and our federal Union.

Today's Court decision, an example of this trend, is not necessary to further any federal interest. On its face, it is inexplicable. The issue is whether the federal law of admiralty, rather than traditional state tort law, should apply to an accident on the Amite River in Louisiana between two small boats. "One was an eighteen foot pleasure boat powered by a 185 h.p. Johnson outboard motor that was being used for water skiing purposes at the time of the accident. The other was a sixteen foot 'bass boat' powered by an outboard motor that was used exclusively for pleasure fishing." 470 F. Supp. 699, 700 (MD La. 1979). It also is undisputed that both boats were used "exclusively for pleasure"; that neither had ever been used in any "commercial maritime activity"; that none of the persons aboard the boats had ever been engaged in any such activity; and that neither of the boats was used for hire. *Ibid.* The Court of Appeals conceded that "the place where the accident occurred is seldom, if ever, used for commercial activity." 641 F. 2d 314, 316 (CA5 1981).

The absence of "commercial activity" on this waterway was held by the Court of Appeals to be immaterial. While recognizing that there was substantial authority to the contrary, the court held that federal admiralty law applied to this accident. This Court now affirms in a decision holding that "all operators of vessels on navigable waters are subject to uniform [federal] rules of conduct," conferring federal admiralty jurisdiction over *all* accidents. *Ante*, at 675 (emphasis deleted). In my view there is no substantial federal interest that justifies a rule extending admiralty jurisdiction to the edge of absurdity. I dissent.

I

Executive Jet Aviation, Inc. v. *City of Cleveland*, 409 U. S. 249 (1972), established that admiralty jurisdiction does

not extend to every accident on navigable waters. The Court today misconstrues *Executive Jet*. We emphasized in that case that it is "consistent with the history and purpose of admiralty to require . . . that the wrong bear a *significant* relationship to *traditional maritime activity*." *Id.*, at 268 (emphasis added). We acknowledged that "in a literal sense there may be some similarities between the problems posed for a plane downed on water and those faced by a sinking ship." *Id.*, at 269. But, recalling that "[t]he law of admiralty has evolved over many centuries," *ibid.*, we noted that admiralty was "concerned with [matters such as] maritime liens, the general average,[1] captures and prizes, limitation of liability, cargo damage, and claims for salvage." *Id.*, at 270. "It is clear, therefore, that neither the fact that a plane goes down on navigable waters nor the fact that the negligence 'occurs' while a plane is flying over such waters is enough to create such a relationship to *traditional maritime activity* as to justify the invocation of admiralty jurisdiction." *Id.*, at 270–271 (emphasis added).

Executive Jet's recognition that "[t]he law of admiralty has evolved over many centuries," *id.*, at 269, provides the appropriate understanding of that case's "traditional maritime activity" test. Admiralty is a specialized area of law that, since its ancient inception, has been concerned with the problems of seafaring *commercial* activity.[2] As Professor Stolz

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[1] The doctrine of general average refers to rules for dividing the loss suffered when cargo must be thrown overboard in order to lighten a ship. See generally G. Gilmore & C. Black, The Law of Admiralty 244–271 (2d ed. 1975).

[2] "Maritime courts, differing somewhat in name and somewhat in jurisdiction, have been established in all civilized nations at various periods in their history. The dates of their establishment may be said, because of the circumstances which brought them into being, to afford a very fair test of the advancement in civilization of their respective nations.

"In every case their establishment has been due to the same cause, the necessities of *commerce*." T. Etting, The Admiralty Jurisdiction in America 7–8 (1879) (emphasis added).

has demonstrated, "[t]here can be no doubt that historically the civil jurisdiction of admiralty was exclusively concerned with matters arising from maritime commerce." Stolz, Pleasure Boating and Admiralty: *Erie* at Sea, 51 Calif. L. Rev. 661, 667 (1963). "The only valid criterion of the admiralty jurisdiction is the relation of the matter—whether it be tortious or contractual in nature—to *maritime commerce*." 7A J. Moore & A. Pelaez, Federal Practice, Admiralty ¶ .325[5], p. 3606 (2d ed. 1982) (emphasis in original).[3]

This case involves only pleasure craft. Neither of these boats had ever been used in any commercial activity. There is, therefore, no connection with any historic federal admiralty interest. In centuries past—long before modern means of transportion by land and air existed—rivers and oceans were the basic means of commerce, and the vessels that used the waterways were limited primarily to commercial and naval purposes.[4] "Pleasure boating is basically a

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[3] See also Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Colum. L. Rev. 259, 280 (1950) ("The main thing is that if the court of admiralty is to exist at all, it should exist because the *business of river, lake, and ocean shipping* calls for supervision by a tribunal enjoying a particular expertness in regard to the more complicated concerns of that *business*") (emphasis added); Swaim, Yes, Virginia, There is an Admiralty: The *Rodrigue* Case, 16 Loyola L. Rev. 43, 44 (1970) ("Maritime commerce—and nothing more—is the *raison d'etre* for the courts and rules of admiralty"); Bridwell & Whitten, Admiralty Jurisdiction: The Outlook for the Doctrine of *Executive Jet*, 1974 Duke L. J. 757, 793; Comment, 12 Cal. Western L. Rev. 535, 558, n. 133 (1976) ("The historical justification for admiralty law and courts is commercial. Its law was designed to meet commercial needs and practice"); Note, 34 Wash. & Lee L. Rev. 121, 139–140 (1977) ("Those pleasure craft torts occurring on commercially navigable waters must be considered in light of the historical design of admiralty jurisdiction to determine whether the exercise of jurisdiction furthers the commercial interests which admiralty courts were created to serve").

[4] At the beginning of the 19th century, "the commerce of the country was almost entirely limited to the foreign and coasting trade. The only roads which existed led from the woods to the principal towns on navigable

new phenomenon, the product of a technology that can produce small boats at modest cost and of an economy that puts such craft within the means of almost everyone."[5] Stolz, *supra*, at 661. Thus, the "traditional" connection emphasized in *Executive Jet* is absent where pleasure boats are concerned. Moreover, even the Court today is hard put to identify an arguably substantial federal admiralty interest *of any kind*. I now comment briefly on the Court's reasoning.

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waters. There was but one connected route from North to South at the commencement of the Revolution, and this was true also when the Constitution was framed. Even in 1796 the only roads with which the States were much concerned were those which led to navigable waters; the care of 'cross roads,' as the roads leading from State to State were called by one who had been a member of the Constitutional Convention, the States were unwilling to assume. 'Fifty miles back from the waters of the Atlantic the country was an unbroken jungle.' In the vigorous phrase used by Henry Clay, 'the country had scarcely any interior.' Turnpike roads did not come into general use until the nineteenth century." E. Prentice, The Federal Power over Carriers and Corporations 59–60 (1907) (footnotes omitted).

[5] For this reason, the jurisdictional issue in this case is relatively new and, until today, has not been addressed by this Court. The Court's contrary suggestion, *ante*, at 672, relies on irrelevant dicta from decisions of the last century that do not involve pleasure craft. *E. g.*, *The Plymouth*, 3 Wall. 20, 36 (1866) (holding admiralty jurisdiction does *not* include adjudication of a loss of packing-houses on a wharf that arose from fire on an adjacent *merchant* ship at anchor). The Court also cites cases apparently involving pleasure boats in which the jurisdictional question was not at issue. See *Levinson* v. *Deupree*, 345 U. S. 648, 651 (1953); *Coryell* v. *Phipps*, 317 U. S. 406 (1943); *Just* v. *Chambers*, 312 U. S. 383 (1941). "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974).

The jurisdictional issue has both a constitutional and a statutory element, since both Art. III and 28 U. S. C. § 1333 must support the exercise of jurisdiction in this case. The Court necessarily must find that both provisions are satisfied. Because construction of the statute is sufficient to support the result I would reach, I intimate no views on the constitutional extent of Art. III admiralty jurisdiction.

II

The Court's justification for extending federal admiralty jurisdiction to the use of millions[6] of small pleasure boats on the countless rivers, streams, and inlets of our country is the need for "uniform rules of conduct." *Ante*, at 675. I agree, of course, that standard codes should govern traffic on waterways, just as it is crucial that certain uniform rules of traffic prevail on neighborhood streets as well as interstate highways. But this is no reason for admiralty jurisdiction to be extended to all boating activity. Congress has provided some rules governing water traffic, just as it has done for some land traffic. See 23 U. S. C. § 154 (55 m.p.h. speed limit). Yet no one suggests that federal jurisdiction is needed to prevent chaos in automobile traffic, or that only federal courts are qualified to try accident cases.

State courts are duty bound to apply federal as well as local "uniform rules of conduct." See *Testa* v. *Katt*, 330 U. S. 386 (1947). The Court does not suggest that state courts lack competency to apply federal as well as state law to this type of water traffic. And this Court stands ready, if necessary, to review state decisions to ensure that important issues of federal law are resolved correctly. As Judge Thornberry said in dissent in this case, "the desire for certainty cannot alone justify the assumption of federal control over matters of purely local concern . . . ." 641 F. 2d, at 317. Consequently the Court's premise that there is a need for uniform traffic rules fails to support its conclusion that federal jurisdiction must be extended to cover the type of activity that typically involves small pleasure craft.

In an effort to rescue its logic, the Court refers to the "potential disruptive impact of a collision between boats on navigable waters . . . ." *Ante*, at 675. Yet this reasoning is

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[6] There were 14.3 million pleasure boats in the United States in 1980. See U. S. Dept. of Transportation, U. S. Coast Guard, Boating Statistics 1980, p. 8 (1981).

countered by *Executive Jet*—a decision that the Court acknowledges to be a key authority for this case. For if "potential disruptive impact" on traffic in navigable waters provides a sufficient connection with "traditional maritime activity," then the crash of an *airplane* "in the navigable waters of Lake Erie," 409 U. S., at 250, necessarily would support admiralty jurisdiction. The holding of *Executive Jet* is precisely to the contrary. The Court's reasoning in essence resurrects the locality rule that *Executive Jet* rejected, for *any* accident "located" on navigable waters has a "potential disruptive impact" on traffic there.[7]

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[7] If a "potential disruptive effect" on interstate traffic in fact implicated a federal interest strong enough to support federal jurisdiction, then federal courts also should hear cases in which accidents disrupt similar *land* traffic. Cf. "71 Feared Dead as Plane Hits Bridge, Smashes Cars, Plunges Into Potomac," Washington Post, Jan. 14, 1982, p. A1, col. 1.

According to the Court, the interest in expanding admiralty jurisdiction is supported by the difficulty of defining "pleasure boating." *Ante*, at 675–676. In view of the myriad of definitional tasks performed regularly by state and federal courts, determining in a particular case whether the boating at issue is essentially for pleasure rather than commerce rarely would present a difficult problem for any court.

The Court also states that its action "is consistent with congressional activity in this area," *ante*, at 676, citing a number of federal statutes. This point is of course wholly irrelevant to the *constitutional* extent of admiralty jurisdiction. Moreover, the only statute cited having any relation to jurisdictional matters is the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U. S. C. § 740. This Act provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land.*

"In any such case suit may be brought in rem or in personam according to the principles of law and rules of practice obtaining in cases *where the injury or damage has been done and consummated on navigable water*" (emphasis added).

As its text makes plain, "[t]his Act was passed specifically to overrule cases, such as *The Plymouth*, *supra*, holding that admiralty does not provide a remedy for damage done to land structures by ships on navigable

Oral argument in this case revealed the degree to which the Court's decision displaces state authority. The Court posed a hypothetical in which children, for their own amusement, used rowboats to net crawfish from a stream. Two of the boats collide and sink near the water's edge, forcing the children to wade ashore. Counsel for respondents replied that this accident *would* fall within the admiralty jurisdiction of the federal courts, provided that the waterway was navigable. Tr. of Oral Arg. 24. Today the Court agrees.

For me, however, this example illustrates the substantial—and *purposeless*—expansion of federal authority and federal-court jurisdiction accomplished by the Court's holding. In this respect I agree with Chief Judge Haynsworth:

> "The admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping, and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vessels from state to state and to and from foreign states. The operation of small pleasure craft on inland waters which happen to be navigable has no more apparent relationship to that kind of concern than the operation of the same kind of craft on artificial inland lakes which are not navigable waters." *Crosson* v. *Vance*, 484 F. 2d 840 (CA4 1973).

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waters." *Executive Jet*, 409 U. S., at 260. This purpose—and not any intent to expand or affect admiralty jurisdiction respecting pleasure boats—consistently appears in the Act's legislative history. See, *e. g.*, S. Rep. No. 1593, 80th Cong., 2d Sess., 1–6 (1948); H. R. Rep. No. 1523, 80th Cong., 2d Sess., 1–6 (1948). See also Farnum, Admiralty Jurisdiction and Amphibious Torts, 43 Yale L. J. 34, 44–45 (1933); Note, 63 Harv. L. Rev. 861, 868 (1950); Note, The Extension of Admiralty Jurisdiction to Include Amphibious Torts, 37 Geo. L. J. 252 (1949); Note, Effects of Recent Legislation Upon the Admiralty Law, 17 Geo. Wash. L. Rev. 353 (1949). And this Court has never sustained the constitutionality of this Act.

With respect, the Court's statutory arguments must be regarded as makeweights.

In the rowboat example, as in the case at bar, the Federal Government has little or no genuine interest in the resolution of a garden variety tort case. "Only the burdening of the federal courts and the frustration of the purposes of state tort law would be thereby served." *Adams* v. *Montana Power Co.*, 528 F. 2d 437, 440–441 (CA9 1975).[8]

The Court's opinion largely ignores the fact that expansions of federal admiralty jurisdiction are accompanied by application of substantive—and *pre-empting*—federal admiralty law. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 214–218 (1917); see *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 738–742 (1961).[9] "The chief objection to application of admiralty law to pleasure boating is that it implicitly prohibits the exercise of state legislative power in an area in which local legislatures have generally been thought competent and in which Congress cannot be expected either to be interested or to be responsive to local needs." Stolz, 51 Calif. L. Rev., at 664. For me, this federalism concern is the dominating issue in the case. I agree that "the law of pleasure boating will develop faster and more rationally if the creative capacities of the state courts and legislatures are freed of an imaginery *[sic]* federal concern with anything that floats on navigable waters." *Id.*, at 719.

Federal courts should not displace state responsibility and choke the federal judicial docket on the basis of federal con-

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[8] In construing the extent of 28 U. S. C. § 1333 admiralty jurisdiction, see n. 5, *supra*, I would prefer to leave to Congress an extension of federal authority of this magnitude. See n. 6, *supra*. Congress has the power to hold hearings and to weigh factors beyond the proper competency of a court.

[9] "It should be emphasized . . . that, in the law of admiralty, the term 'jurisdiction' denotes both the power of a court to hear and dispose of a certain controversy, and also the power to prescribe rules of decision to be applied by those courts considering the controversy. This is so because a court of admiralty sits solely to administer and apply the maritime law." Swaim, *supra* n. 3, at 43 (footnotes and emphasis omitted).

cerns that in truth are only "imaginary." In accord with the teaching of *Executive Jet*, I would not extend federal admiralty jurisdiction beyond its traditional roots and reason for existence. I dissent from the Court's decision to sever a historic doctrine from its historic justification.

TAYLOR *v.* ALABAMA

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 81–5152. Argued March 23, 1982—Decided June 23, 1982

Petitioner was arrested on a grocery-store robbery charge without a warrant or probable cause, based on an uncorroborated informant's tip, and was taken to the police station, where he was given *Miranda* warnings, fingerprinted, questioned, and placed in a lineup. After being told that his fingerprints matched those on grocery items handled by one of the participants in the robbery and after a short visit with his girlfriend, petitioner signed a written confession. Over petitioner's objection, the confession was admitted into evidence at his trial in an Alabama state court, and he was convicted. The Alabama Court of Criminal Appeals reversed, holding that the confession should not have been admitted, but was in turn reversed by the Alabama Supreme Court.

Held: Petitioner's confession should have been suppressed as the fruit of an illegal arrest. *Brown* v. *Illinois*, 422 U. S. 590; *Dunaway* v. *New York*, 442 U. S. 200. Pp. 689–694.

(a) A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. Pp. 689–690.

(b) Here, there was no meaningful intervening event. The illegality of the initial arrest was not cured by the facts that six hours elapsed between the arrest and confession; that the confession may have been "voluntary" for Fifth Amendment purposes because *Miranda* warnings were given; that petitioner was permitted a short visit with his girlfriend; or that the police did not physically abuse petitioner. Nor was the fact that an arrest warrant, based on a comparison of fingerprints, was filed after petitioner had been arrested and while he was being interrogated a significant intervening event, such warrant being irrelevant to whether the confession was the fruit of an illegal arrest. The initial fingerprints, which were themselves the fruit of the illegal arrest and were used to extract the confession, cannot be deemed sufficient "attenuation" to break the connection between the illegal arrest and the confession merely because they formed the basis for the arrest warrant. Pp. 690–693.

399 So. 2d 881, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dis-

senting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 694.

Robert M. Beno argued the cause and filed briefs for petitioner.

Thomas R. Allison, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Charles A. Graddick*, Attorney General.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the narrow question whether petitioner's confession should have been suppressed as the fruit of an illegal arrest. The Supreme Court of Alabama held that the evidence was properly admitted. Because the decision below is inconsistent with our decisions in *Dunaway* v. *New York*, 442 U. S. 200 (1979), and *Brown* v. *Illinois*, 422 U. S. 590 (1975), we reverse.

I

In 1978, a grocery store in Montgomery, Ala., was robbed. There had been a number of robberies in this area, and the police had initiated an intensive manhunt in an effort to apprehend the robbers. An individual who was at that time incarcerated on unrelated charges told a police officer that "he had heard that [petitioner] Omar Taylor was involved in the robbery." App. 4. This individual had never before given similar information to this officer, did not tell the officer where he had heard this information, and did not provide any details of the crime. This tip was insufficient to give

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**Arthur F. Mathews* and *James E. Coleman, Jr.*, filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Fred E. Inbau, Wayne W. Schmidt, James P. Manak, Patrick F. Healy, William K. Lambie, Richard J. Brzeczek, Frank G. Carrington, Courtney A. Evans, Robert K. Corbin, Attorney General of Arizona, and *Steven J. Twist*, Chief Assistant Attorney General, *Tyrone C. Fahner*, Attorney General of Illinois, and *Melbourne Noel*, Chief Assistant Attorney General, and *William L. Parker, Jr.*, filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging affirmance.

the police probable cause to obtain a warrant or to arrest petitioner.

Nonetheless, on the basis of this information, two officers arrested petitioner without a warrant. They told petitioner that he was being arrested in connection with the grocery-store robbery, searched him, and took him to the station for questioning. Petitioner was given the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). At the station, he was fingerprinted, readvised of his *Miranda* rights, questioned, and placed in a lineup. The victims of the robbery were unable to identify him in the lineup. The police told petitioner that his fingerprints matched those on some grocery items that had been handled by one of the participants in the robbery. After a short visit with his girlfriend and a male companion, petitioner signed a waiver-of-rights form and executed a written confession. The form and the signed confession were admitted into evidence.

Petitioner objected to the admission of this evidence at his trial. He argued that his warrantless arrest was not supported by probable cause, that he had been involuntarily transported to the police station, and that the confession must be suppressed as the fruit of this illegal arrest. The trial court overruled this objection, and petitioner was convicted. On appeal, the Alabama Court of Criminal Appeals reversed, 399 So. 2d 875 (1980), holding that the facts of this case are virtually indistinguishable from those presented to this Court in *Dunaway* v. *New York*, *supra*, and that the confession should not have been admitted into evidence. The Alabama Supreme Court reversed the Court of Criminal Appeals, 399 So. 2d 881 (1981), and we granted certiorari, 454 U. S. 963 (1981).

II

In *Brown* v. *Illinois*, *supra*, and *Dunaway* v. *New York*, *supra*, the police arrested suspects without probable cause. The suspects were transported to police headquarters, advised of their *Miranda* rights, and interrogated. They con-

fessed within two hours of their arrest. This Court held that the confessions were not admissible at trial, reasoning that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is "'sufficiently an act of free will to purge the primary taint.'" *Brown* v. *Illinois*, *supra*, at 602 (quoting *Wong Sun* v. *United States*, 371 U. S. 471, 486 (1963)). See also *Dunaway* v. *New York*, *supra*, at 217. This Court identified several factors that should be considered in determining whether a confession has been purged of the taint of the illegal arrest: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct." *Brown* v. *Illinois*, *supra*, at 603–604 (citations and footnote omitted); *Dunaway* v. *New York*, 442 U. S., at 218. The State bears the burden of proving that a confession is admissible. *Ibid.*

In *Brown* and *Dunaway*, this Court firmly established that the fact that the confession may be "voluntary" for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. In this situation, a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. See *Dunaway* v. *New York*, *supra*, at 217. The reason for this approach is clear: "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth" Amendment. *Brown* v. *Illinois*, 422 U. S., at 601. If *Miranda* warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere "'form of words.'" *Id.*, at 603 (quoting *Mapp* v. *Ohio*, 367 U. S. 643, 648 (1961)).

This case is a virtual replica of both *Brown* and *Dunaway*.

Petitioner was arrested without probable cause in the hope that something would turn up, and he confessed shortly thereafter without any meaningful intervening event. The State's arguments to the contrary are unpersuasive. The State begins by focusing on the temporal proximity of the arrest and the confession. It observes that the length of time between the illegal arrest and the confession was six hours in this case, while in *Brown* and *Dunaway* the incriminating statements were obtained within two hours. However, a difference of a few hours is not significant where, as here, petitioner was in police custody, unrepresented by counsel, and he was questioned on several occasions, fingerprinted, and subjected to a lineup. The State has not even demonstrated the amount of this time that was spent in interrogation, arguing only that petitioner "had every opportunity to consider his situation, to organize his thoughts, to contemplate his constitutional rights, and to exercise his free will." Brief for Respondent 11.

The State points to several intervening events that it argues are sufficient to break the connection between the illegal arrest and petitioner's confession. It observes that petitioner was given *Miranda* warnings three times. As our foregoing discussion of *Brown* and *Dunaway* demonstrates, however, the State's reliance on the giving of *Miranda* warnings is misplaced. The State also observes that petitioner visited with his girlfriend and a male companion before he confessed. This claim fares no better. According to the officer and petitioner, these two visitors were outside the interrogation room where petitioner was being questioned. After petitioner signed a waiver-of-rights form, he was allowed to meet with these visitors. The State fails to explain how this 5- to 10-minute visit, after which petitioner immediately recanted his former statements that he knew nothing about the robbery and signed the confession, could possibly have contributed to his ability to consider carefully and objectively his options and to exercise his free will. This sugges-

tion is particularly dubious in light of petitioner's uncontroverted testimony that his girlfriend was emotionally upset at the time of this visit.[1] If any inference could be drawn, it would be that this visit had just the opposite effect.

The State points to an arrest warrant filed after petitioner had been arrested and while he was being interrogated as another significant "intervening event." While petitioner was in custody, the police determined that the fingerprints on some grocery items matched those that they had taken from petitioner immediately after his arrest. Based on this comparison, an arrest warrant was filed. The filing of this warrant, however, is irrelevant to whether the confession was the fruit of the illegal arrest. This case is not like *Johnson* v. *Louisiana*, 406 U. S. 356 (1972), where the defendant was brought before a committing Magistrate who advised him of his rights and set bail. Here, the arrest warrant was filed *ex parte*, based on the comparison of the fingerprints found at the scene of the crime and petitioner's fingerprints, which had been taken immediately after his arrest. The initial fin-

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[1] According to petitioner, his girlfriend became upset upon hearing the officer advise petitioner to cooperate. App. 16. Contrary to the allegations in the dissent, at no point did the officer contradict petitioner's version of his girlfriend's emotional state or petitioner's statement that his girlfriend was present at the time the officer advised him to cooperate. In fact, the testimony from both petitioner and the officer with respect to this visit are consistent. The officer testified only that he advised petitioner to cooperate between the time petitioner signed a rights form at the commencement of this interrogation period and the time that petitioner signed the statement of confession. Tr. 31, 136–137. He also testified that during this same interval, he allowed the short visit between petitioner and his girlfriend. *Ibid.* The District Court made no findings of fact with respect to these incidents. In any event, even assuming the accuracy of the dissent's version of the facts, compare *post*, at 695, and n. 2, with Tr. 31, 136–137, the dissent offers no explanation for its conclusion that this 5- to 10-minute visit should be viewed as an intervening event that purges the taint of the illegal arrest.

gerprints, which were themselves the fruit of petitioner's illegal arrest, see *Davis* v. *Mississippi*, 394 U. S. 721 (1969), and which were used to extract the confession from petitioner, cannot be deemed sufficient "attenuation" to break the connection between the illegal arrest and the confession merely because they also formed the basis for an arrest warrant that was filed while petitioner was being interrogated.[2]

Finally, the State argues that the police conduct here was not flagrant or purposeful, and that we should not follow our decisions in *Brown* and *Dunaway* for that reason. However, we fail to see any relevant distinction between the conduct here and that in *Dunaway*. In this case, as in *Dunaway*, the police effectuated an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and involuntarily transported petitioner to the station for interrogation in the hope that something would turn up. The fact that the police did not physically abuse petitioner, or that the confession they obtained may have been "voluntary" for purposes of the Fifth Amendment, does not cure the illegality of the initial arrest. Alternatively, the State contends that the police conduct here argues for adopting a "good faith" exception to the exclusionary rule. To date, we have not recognized such an exception, and we decline to do so here.

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[2] Petitioner also raises an ambiguous objection to the admission of fingerprint evidence at his trial. The trial court granted petitioner's motion to suppress the initial fingerprints as the fruit of his illegal arrest under *Davis* v. *Mississippi*, 394 U. S. 721 (1969), and granted the State's motion to take petitioner's fingerprints at trial. The nature of petitioner's objection to the admission of any fingerprint evidence at trial is unclear, and it is also uncertain whether an objection to the procedure used for taking the second set of fingerprints has been properly preserved for our review. In any event, we need not reach this issue because we reverse the decision on the ground that the confession should not have been admitted. To the extent that petitioner still may challenge the fingerprinting procedure employed below, the state courts should be given the opportunity to address this challenge in the first instance.

III

In sum, petitioner's confession was the fruit of his illegal arrest. Under our decisions in *Brown* v. *Illinois* and *Dunaway* v. *New York*, the confession clearly should not have been admitted at his trial. Accordingly, we reverse the decision of the Alabama Supreme Court and remand this case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

The Court holds today that Omar Taylor's detailed confession was the fruit of an illegal arrest, and consequently, should be suppressed. Because I conclude that neither the facts nor the law supports the Court's analysis, I respectfully dissent.

I

In the course of their investigation of the Moseley robbery, Montgomery police questioned Charles Martin, who was being held on unrelated rape and robbery charges. Martin stated that "he had heard that Omar Taylor was involved in the robbery of Moseley's Grocery," Tr. 6, but the police made no attempt to establish either Martin's credibility as an informant or the reliability of the information he provided.[1]

Based only on this tip, which did not provide probable cause, Sergeants Alford and Rutland arrested Taylor a little before 3 p.m. on January 4, 1979. At that time, they told him why he was being arrested and advised him of his *Miranda* rights, but asked him no questions regarding the robbery. Tr. 20, 24. When they arrived at the police station, the officers turned Taylor over to detectives.

After Taylor had been fingerprinted and signed a form

[1] The police, however, suspected Martin of complicity in the Moseley robbery, Tr. 15. It later developed that Martin had instigated, planned, and participated in the robbery.

acknowledging his *Miranda* rights, Detective Wilson questioned him for about 15 minutes, Tr. 48, and placed him in a lineup before one of the victims, Mrs. Moseley. *Id.*, at 37–38. At the lineup, which lasted about an hour, *id.*, at 48, Mrs. Moseley was unable to identify the petitioner. Following the lineup, Detective Wilson told Taylor that his fingerprints matched the fingerprints removed from grocery items handled by one of the robbers. Nevertheless, the petitioner denied knowledge of the robbery.

Toward 9 p.m. that evening, Detective Hicks readvised Taylor of his *Miranda* rights, Tr. 25, and Taylor once again read and signed a form setting forth his *Miranda* rights. Tr. 28, 125. At no time did Taylor ask for a lawyer or indicate that he did not want to talk to police. *Id.*, at 28–29, 35, 40. During his 5- to 10-minute interview with Taylor, Detective Hicks confronted him with the fingerprint evidence. *Id.*, at 36. Hicks urged the petitioner to cooperate with the police, but carefully refrained from making him any promises, stating that at most he could inform the judge of the petitioner's cooperation. *Id.*, at 31, 34. Taylor continued to deny involvement in the robbery. *Id.*, at 35–36.

Following this conversation, both the petitioner's girlfriend and his neighbor came to the police station and requested to speak with him. When Taylor indicated that he wanted to speak with his friends, Detective Hicks left them alone in his office for several minutes.[2] After that meeting,

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[2]The Court's rather different account of this meeting apparently stems from a decision to accept the testimony most favorable to the holding it wants to reach. That decision, however, runs counter to the longstanding practice of federal appellate courts to uphold the denial of the motion to suppress if, in the absence of any express findings by the district court, there is any reasonable view of the evidence to support it. See *United States* v. *Payton*, 615 F. 2d 922, 923 (CA1), cert. denied, 446 U. S. 969 (1980); *United States* v. *Vicknair*, 610 F. 2d 372, 376, n. 4 (CA5), cert. denied, 449 U. S. 823 (1980). In the present case, the officer testified that Taylor's "girlfriend came to us and said she wanted to talk to Omar, and we told Omar she was outside and he wanted to talk to her. And at that time, we let him talk to her." Tr. 35. Detective Hicks specifically denied that

the petitioner confessed to the crime, and signed a detailed written confession.[3]

Before trial, the petitioner moved to suppress his confes-

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he had urged Taylor to talk to his girlfriend. *Id.*, at 35, 133–134. The detective acknowledged that he had told the petitioner that he could inform the judge of the petitioner's cooperation, but he expressly denied making any other statements to Taylor or his girlfriend about "cooperation." *Id.*, at 31, 134.

The petitioner, of course, had a vastly different version. He testified that the police had brought his girlfriend into the room and told him, in her presence, that he was facing 10 years to life in prison, but that if he cooperated they might be able to arrange a suspended sentence or probation. Upon hearing that remark, the petitioner's girlfriend became upset and began to cry, at which point the police left the petitioner alone with his friends. *Id.*, at 52. As we noted above, the police expressly denied making any such statements. More importantly, upon comparing the two versions, it becomes clear that in an effort to support its holding, the Court has parsed through the petitioner's story and plucked those tidbits that the police did not expressly contradict. This method of setting forth the facts of a case on appellate review hardly comports with the rule that an appellate court must adopt any reasonable view of the evidence that supports the trial court's ruling.

Since there is nothing unreasonable about the police account of the meeting between the petitioner and his friends, that version is the one we must accept on review. At the hearing, Detective Hicks testified that after Taylor asked to speak with his friends, the police left them alone together. There is no suggestion, other than the petitioner's discredited version of the meeting, that the police said anything to the petitioner's girlfriend, or that she became upset. Thus, the Court errs in stating that the petitioner's girlfriend became upset because of statements made by the police, and in intimating that the police created a coercive atmosphere in which the petitioner could not carefully consider his options and, on the basis of his friends' advice, decide to confess to the robbery.

[3] In that confession, the petitioner stated that Charles Martin approached him with guns and a plan to rob Moseley's Grocery. Taylor's role in the robbery was to distract Mr. Moseley by buying some groceries. Just before his accomplices pulled out their guns, Taylor put down the groceries and walked outside to see whether an approaching car was a police car. When he saw that it was not a police car, he began to reenter the store, but stopped when he saw the robbery taking place. Thereafter he fled, met his cofelons at a preassigned place, and took his share of the money. *Id.*, at 128–132.

sion, arguing that it was the product of an illegal arrest, and that it had been obtained in violation of his Fifth and Sixth Amendment rights. The trial judge assumed that the arrest was illegal,[4] but found that the confession was voluntary, consistent with the Fifth and Sixth Amendments, and that "there were enough intervening factors between the arrest and confession" to overcome the taint of the illegal arrest. *Id.*, at 116. Accordingly, he admitted the confession.

II

Although the Court misapprehends the facts of the present case, it has stated correctly the controlling substantive law. In the Court's words, "a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" *Ante*, at 690 (quoting *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975)).

In *Brown*, this Court emphasized that "*Miranda* warnings are an important factor . . . in determining whether the confession [was] obtained by exploitation of an illegal arrest." *Id.*, at 603.[5] The Court did not discount the significance

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[4] In fact, the State did not seriously contend that the arrest had been based on probable cause. See *id.*, at 8, 10.

[5] The holding in *Brown* was derived from this Court's seminal decision in *Wong Sun* v. *United States*, 371 U. S. 471 (1963), in which we rejected a "but for" test for determining whether to suppress evidence gathered following a Fourth Amendment violation.

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." *Id.*, at 487–488.

of other factors, however, noting that "*Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Ibid.* *Brown* holds, therefore, that not only *Miranda* warnings, but also "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant." *Id.*, at 603–604 (footnotes and citations omitted).

In light of those factors, the *Brown* Court reviewed the record and found that "Brown's first statement was separated from his illegal arrest by less than two hours, and [that] there was no intervening event of significance whatsoever." *Id.*, at 604. Moreover, the police conduct in arresting Brown was particularly egregious. The "impropriety of the arrest was obvious," and the "manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.*, at 605. The Court held that as a consequence the confession should have been suppressed.

Four Terms later, in *Dunaway* v. *New York*, 442 U. S. 200, 204 (1979), this Court reaffirmed the *Brown* rule that in order to use at trial statements obtained following an arrest on less than probable cause

> "the prosecution must show not only that the statements meet the Fifth Amendment voluntariness standard, but also that the causal connection between the statements and the illegal arrest is broken sufficiently to purge the primary taint of the illegal arrest."

Finding the facts in *Dunaway* to be "virtually a replica of the situation in *Brown*," *id.*, at 218, the Court held that the petitioner's confession should have been suppressed. Critical to the Court's holding was its observation that the petitioner

"confessed without any intervening event of significance." *Ibid.* See *id.*, at 219 ("No intervening events broke the connection between petitioner's illegal detention and his confession").

III

Our task is to apply the law as articulated in *Brown* and *Dunaway* to the facts of this case.

The first significant consideration is that following his unlawful arrest, Taylor was warned on three separate occasions that he

> "had a right to remain silent, [and] anything he said could be used against him in a court of law[;] he had the right to have an attorney present, [and] if he could not afford one, the State would appoint one for him[;] he could answer questions but he could stop answering at any time." Tr. 23.

Under *Brown* and *Dunaway*, these warnings must be counted as "an important factor . . . in determining whether the confession [was] obtained by exploitation of an illegal arrest," *Brown* v. *Illinois*, *supra*, at 603, though they are, standing alone, insufficient to prove that the primary taint of an illegal arrest had been purged.

Second, in contrast to the facts in *Brown*, the facts in the present case show that the petitioner was not subjected to intimidating police misconduct. In *Brown*, police had broken into the petitioner's house and searched it. When the petitioner later came home, two officers pointed their guns at him and arrested him, leading the Court to conclude that "[t]he manner in which [the petitioner's] arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." 422 U. S., at 605. By contrast, nothing in the record before us indicates that the petitioner's arrest was violent, or designed to "cause surprise, fright, and confusion." Instead, Montgomery officers ap-

proached Taylor, asked him his name, and told him that he was under arrest for the Moseley robbery. They then searched him, advised him of his rights, and took him to the police station.

Third, while in both *Brown* and *Dunaway* there was "no intervening event of significance whatsoever," 422 U. S., at 604, in the present case Taylor's girlfriend and neighbor came to the police station and asked to speak with him. Before meeting with his two friends, the petitioner steadfastly had denied involvement in the Moseley robbery. Immediately following the meeting, the petitioner gave a complete and detailed confession of his participation in the armed robbery. This meeting between the petitioner and his two friends, as described by the police in their testimony at the suppression hearing, plainly constituted an intervening circumstance.

Finally, the record reveals that the petitioner spent most of the time between his arrest and confession by himself.[6] In *Dunaway* and *Brown*, by contrast, the defendants were interrogated continuously before they made incriminating statements.

In sum, when these four factors are considered together,[7] it is obvious that there is no sufficient basis on which to overturn the trial court's finding that "there were enough intervening factors" to overcome the taint of the illegal arrest. In fact, I believe it is clear that the State carried its burden of proof. The petitioner was warned of his rights to remain si-

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[6] The petitioner confessed some six hours after his arrest. As JUSTICE STEVENS noted in his concurring opinion in *Dunaway*, the "temporal relationship between the arrest and the confession may be an ambiguous factor," 442 U. S., at 220, for a lengthy detention could be used to exploit an illegal arrest at least as easily as a brief detention. In the present case, there seems to be nothing remarkable, one way or the other, about the length of detention.

[7] The Court has taken each circumstance out of context and examined it to see whether it alone would be enough to purge the taint of the illegal arrest. The Court's failure to consider the circumstances of this case as a whole may have contributed to its erroneous conclusion.

lent and to have a lawyer present, and there is no dispute that he understood those rights or that he waived them voluntarily and without coercion. After receiving three sets of such warnings, he met with his girlfriend and neighbor, *at his request*. Following that meeting, at which no police officers were present, the petitioner decided to confess to his participation in the robbery. The petitioner's confession was not proximately caused by his illegal arrest, but was the product of a decision based both on knowledge of his constitutional rights and on the discussion with his friends. Accordingly, I respectfully dissent.

JACKSONVILLE BULK TERMINALS, INC., ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80–1045. Argued January 18, 1982—Decided June 24, 1982

After President Carter announced certain trade restrictions with the Soviet Union because of its intervention in Afghanistan, respondent International Longshoremen's Association announced that its members would not handle any cargo bound to, or coming from, the Soviet Union. When an affiliated local union refused to load certain goods (not included in the Presidential embargo) bound for the Soviet Union, petitioners (hereafter collectively referred to as the Employer) brought suit in Federal District Court against respondents, the international union, its officers and agents, and the local union (hereafter collectively referred to as the Union), pursuant to § 301(a) of the Labor Management Relations Act. The Employer alleged that the Union's work stoppage violated the terms of a collective-bargaining agreement which contained a no-strike clause and a provision requiring arbitration of disputes. As requested by the Employer, the court ordered the Union to arbitrate the question whether the work stoppage violated the collective-bargaining agreement, and granted a preliminary injunction pending arbitration. The court reasoned that the political motivation behind the work stoppage rendered inapplicable § 4 of the Norris-La Guardia Act, which prohibits injunctions against strikes "in any case involving or growing out of any labor dispute." The Court of Appeals affirmed the District Court's order insofar as it required arbitration, but disagreed with the conclusion that the Norris-La Guardia Act was not applicable.

Held:

1. The Norris-La Guardia Act applies to this case, which involves a "labor dispute" even though the work stoppage was politically motivated. Pp. 709–720.

(a) The plain language of the Act—prohibiting injunctions in "any" labor dispute and defining "labor dispute" to include "any controversy concerning terms or conditions of employment"—does not except labor disputes having their genesis in political protests. Here, the Employer sought injunctive relief as to the dispute over whether the work stoppage violated the no-strike clause of the bargaining agreement, not as to

the event that triggered the stoppage. The term "labor dispute" must not be narrowly construed, the critical element in determining whether the Act applies being whether, as here, "the employer-employee relationship [is] the matrix of the controversy." *Columbia River Packers Assn.* v. *Hinton*, 315 U. S. 143, 147. The existence of noneconomic motives does not make the Act inapplicable. Pp. 710–715.

(b) The legislative history of both the Norris-La Guardia Act and the 1947 amendments to the National Labor Relations Act indicates that the Norris-La Guardia Act was intended to apply to politically motivated work stoppages. Pp. 715–719.

(c) The Norris-La Guardia Act's broad prohibitions will not be constricted, except in narrowly defined situations where accommodation of the Act to specific congressional policy is necessary. Pp. 719–720.

2. Nor may the Union's work stoppage here be enjoined, pending arbitration, under the rationale of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235, and *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397, on the asserted ground that the dispute underlying the stoppage is arbitrable under the collective-bargaining agreement. While *Boys Markets* recognized an exception to the anti-injunction provisions of the Norris-La Guardia Act when the employer sought to enforce the union's contractual obligation to arbitrate grievances rather than to strike over them, *Buffalo Forge* makes it clear that a *Boys Markets* injunction pending arbitration may not issue unless the dispute underlying the work stoppage is arbitrable. Here the underlying dispute, whether viewed as an expression of the Union's "moral outrage" at Soviet military policy or as an expression of sympathy for the people of Afghanistan, is plainly not arbitrable under the collective-bargaining agreement. Thus the strike may not be enjoined pending the arbitrator's ruling on the legality of the strike under the no-strike clause of the collective-bargaining agreement. Pp. 720–723.

626 F. 2d 455, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 724. BURGER, C. J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 724. POWELL, J., *post*, p. 729, and STEVENS, J., *post*, p. 730, filed dissenting opinions.

Thomas P. Gies argued the cause for petitioners. With him on the briefs were *Andrew M. Kramer, Zachary D. Fasman*, and *Kenneth A. McGaw*.

Ernest L. Mathews, Jr., argued the cause for respondents. With him on the brief were *Thomas W. Gleason* and *Charles R. Goldburg.**

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we consider the power of a federal court to enjoin a politically motivated work stoppage in an action brought by an employer pursuant to § 301(a) of the Labor Management Relations Act (LMRA), 61 Stat. 156, 29 U. S. C. § 185(a), to enforce a union's obligations under a collective-bargaining agreement. We first address whether the broad anti-injunction provisions of the Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.*, apply to politically motivated work stoppages. Finding these provisions applicable, we then consider whether the work stoppage may be enjoined under the rationale of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970), and *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976), pending an arbitrator's decision on whether the strike violates the collective-bargaining agreement.

I

On January 4, 1980, President Carter announced that, due to the Soviet Union's intervention in Afghanistan, certain trade with the Soviet Union would be restricted. Superphosphoric acid (SPA), used in agricultural fertilizer, was not included in the Presidential embargo.[1] On January 9, 1980,

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**Solicitor General McCree, Acting Assistant Attorney General Schiffer, Elinor Hadley Stillman*, and *Anthony J. Steinmeyer* filed a brief for the United States as *amicus curiae* urging reversal.

J. Albert Woll, Marsha S. Berzon, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

[1] On February 25, 1980, the embargo was extended to include SPA along with other products. On April 24, 1981, President Reagan lifted the SPA embargo as part of his decision to remove restrictions on the sale of grain to the Soviets. By telegrams dated April 24, 1981, and June 5, 1981, the International Longshoremen's Association recommended to its members that they resume handling goods to

respondent International Longshoremen's Association (ILA) announced that its members would not handle any cargo bound to, or coming from, the Soviet Union or carried on Russian ships.[2] In accordance with this resolution, respondent local union, an ILA affiliate, refused to load SPA bound for the Soviet Union aboard three ships that arrived at the shipping terminal operated by petitioner Jacksonville Bulk Terminals, Inc. (JBT), at the Port of Jacksonville, Fla., during the month of January 1980.

In response to this work stoppage, petitioners JBT, Hooker Chemical Corp., and Occidental Petroleum Co. (collectively referred to as the Employer)[3] brought this ac-

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and from the Soviet Union. Although the work stoppage is no longer in effect, there remains a live controversy over whether the collective-bargaining agreement prohibits politically motivated work stoppages, and the Union may resume such a work stoppage at any time. As a result, this case is not moot. See *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397, 403, n. 8 (1976).

[2] The President of the ILA made the following announcement:

"In response to overwhelming demands by the rank and file members of the Union, the leadership of the ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

. . . . . .

"The reason for this action should be apparent in light of international events that have affected relations between the U. S. & Soviet Union.

"However, the decision by the Union leadership was made necessary by the demands of the workers.

"It is their will to refuse to work Russian vessels and Russian cargoes under present conditions of the world.

"People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs." Brief for Respondents 2, n. 2.

[3] JBT is a wholly owned subsidiary of Oxy Chemical Corp., which is a subsidiary of Hooker. Ownership of all these corporations is ultimately vested in Occidental. Hooker Chemical Co. manufactures SPA at a manufacturing facility in Florida. Pursuant to a bilateral trade agreement between Occidental and the Soviet Union, SPA is shipped to the Soviet Union from the JBT facility in Jacksonville.

tion pursuant to § 301(a) of the LMRA, 29 U. S. C. § 185(a), against respondents ILA, its affiliated local union, and its officers and agents (collectively referred to as the Union). The Employer alleged that the Union's work stoppage violated the collective-bargaining agreement between the Union and JBT. The Employer sought to compel arbitration under the agreement, requested a temporary restraining order and a preliminary injunction pending arbitration, and sought damages.

The agreement contains both a broad no-strike clause and a provision requiring the resolution of all disputes through a grievance procedure, ending in arbitration.[4] The no-strike clause provides:

> "During the term of this Agreement, . . . the Union agrees there shall not be any strike of any kind or degree whatsoever, . . . for any cause whatsoever; such causes including but not limited to, unfair labor practices by the Employer or violation of this Agreement. The right of employees not to cross a bona fide picket line is recognized by the Employer. . . ."

The United States District Court for the Middle District of Florida ordered the Union to process its grievance in accordance with the contractual grievance procedure. The District Court also granted the Employer's request for a preliminary injunction pending arbitration, reasoning that the political

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[4] The grievance and arbitration clause provides in relevant part:

"Matters under dispute which cannot be promptly settled between the Local and an individual Employer shall . . . be referred . . . to a Port Grievance Committee . . . . In the event this Port Grievance Committee cannot reach an agreement . . . the dispute shall be referred to the Joint Negotiating Committee . . . .

. . . . . .

"A majority decision of this Committee shall be final and binding on both parties and on all Employers signing this Agreement. In the event the Committee is unable to reach a majority decision within 72 hours after meeting to discuss the case, it shall employ a professional arbitrator . . . ."

motivation behind the work stoppage rendered the Norris-La Guardia Act's anti-injunction provisions inapplicable.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's order to the extent it required arbitration of the question whether the work stoppage violated the collective-bargaining agreement. *New Orleans Steamship Assn.* v. *General Longshore Workers*, 626 F. 2d 455 (1980).[5] However, the Court of Appeals disagreed with the District Court's conclusion that the provisions of the Norris-La Guardia Act are inapplicable to politically motivated work stoppages. Relying on *Buffalo Forge*, the Court of Appeals further held that the Employer was not entitled to an injunction pending arbitration because the underlying dispute was not arbitrable. We granted certiorari, 450 U. S. 1029 (1981), and agree with the Court of Appeals that the provisions of the Norris-La Guardia Act apply to this case, and that, under *Buffalo Forge*, an injunction pending arbitration may not issue.

II

Section 4 of the Norris-La Guardia Act provides in part:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> "(a) Ceasing or refusing to perform any work or to remain in any relation of employment." 47 Stat. 70, 29 U. S. C. § 104.

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[5] The Union concedes that the question whether the work stoppage violates the no-strike clause is arbitrable. In a consolidated case, the Court of Appeals upheld an injunction issued by the United States District Court for the Eastern District of Louisiana enforcing an arbitrator's decision that the ILA work stoppage violated a collective-bargaining agreement. 626 F. 2d, at 469.

Congress adopted this broad prohibition to remedy the growing tendency of federal courts to enjoin strikes by narrowly construing the Clayton Act's labor exemption from the Sherman Act's prohibition against conspiracies to restrain trade, see 29 U. S. C. § 52. See, *e. g.*, H. R. Rep. No. 669, 72d Cong., 1st Sess., 7–8, 10–11 (1932). This Court has consistently given the anti-injunction provisions of the Norris-La Guardia Act a broad interpretation, recognizing exceptions only in limited situations where necessary to accommodate the Act to specific federal legislation or paramount congressional policy. See, *e. g.*, *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S., at 249–253; *Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30, 39–42 (1957).

The *Boys Markets* exception, as refined in *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976), is relevant to our decision today. In *Boys Markets*, this Court re-examined *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962), which held that the Norris-La Guardia Act precludes a federal district court from enjoining a strike in breach of a collective-bargaining agreement, even where that agreement contains provisions for binding arbitration of the grievance concerning which the strike was called. 398 U. S., at 237–238. The Court overruled *Sinclair* and held that, in order to accommodate the anti-injunction provisions of Norris-La Guardia to the subsequently enacted provisions of § 301(a) and the strong federal policy favoring arbitration, it was essential to recognize an exception to the anti-injunction provisions for cases in which the employer sought to enforce the union's contractual obligation to arbitrate grievances rather than to strike over them. 398 U. S., at 249–253.[6]

After *Boys Markets*, the Courts of Appeals divided on the question whether a strike could be enjoined under the *Boys*

[6] In *Boys Markets*, the underlying dispute was clearly subject to the grievance and arbitration procedures of the collective-bargaining agreement, and the strike clearly violated the no-strike clause.

Markets exception to the Norris-La Guardia Act pending arbitration, when the strike was not over a grievance that the union had agreed to arbitrate.[7] In *Buffalo Forge*, the Court resolved this conflict and held that the *Boys Markets* exception does not apply when only the question whether the strike violates the no-strike pledge, and not the dispute that precipitated the strike, is arbitrable under the parties' collective-bargaining agreement.[8]

The Employer argues that the Norris-La Guardia Act does not apply in this case because the political motivation underlying the Union's work stoppage removes this controversy from that Act's definition of a "labor dispute." Alternatively, the Employer argues that this case fits within the exception to that Act recognized in *Boys Markets* as refined in *Buffalo Forge*. We review these arguments in turn.

III

At the outset, we must determine whether this is a "case involving or growing out of any labor dispute" within the meaning of § 4 of the Norris-La Guardia Act, 29 U. S. C. § 104. Section 13(c) of the Act broadly defines the term "labor dispute" to include "any controversy concerning terms or conditions of employment." 47 Stat. 73, 29 U. S. C. § 113(c).[9]

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[7] See cases cited in *Buffalo Forge*, 428 U. S., at 404, n. 9.

[8] In *Buffalo Forge*, the strike at issue was a sympathy strike in support of sister unions negotiating with the employer. The Court reasoned that there was no need to accommodate the policies of the Norris-La Guardia Act to § 301 and to the federal policy favoring arbitration when a strike is not called over an arbitrable dispute, because such a strike does not directly frustrate the arbitration process by denying or evading the union's promise to arbitrate. 428 U. S., at 407–412.

[9] Section 13(c) provides:

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to

The Employer argues that the existence of political motives takes this work stoppage controversy outside the broad scope of this definition. This argument, however, has no basis in the plain statutory language of the Norris-La Guardia Act or in our prior interpretations of that Act. Furthermore, the argument is contradicted by the legislative history of not only the Norris-La Guardia Act but also the 1947 amendments to the National Labor Relations Act (NLRA).

A

An action brought by an employer against the union representing its employees to enforce a no-strike pledge generally involves two controversies. First, there is the "underlying dispute," which is the event or condition that triggers the work stoppage. This dispute may or may not be political, and it may or may not be arbitrable under the parties' collective-bargaining agreement. Second, there is the parties' dispute over whether the no-strike pledge prohibits the work stoppage at issue. This second dispute can always form the basis for federal-court jurisdiction, because § 301(a) gives federal courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U. S. C. § 185(a).

It is beyond cavil that the second form of dispute—whether the collective-bargaining agreement either forbids or permits the union to refuse to perform certain work—is a "controversy concerning the terms or conditions of employment." 29 U. S. C. § 113(c). This § 301 action was brought to resolve just such a controversy. In its complaint, the Employer did not seek to enjoin the intervention of the Soviet Union in Afghanistan, nor did it ask the District Court to decide whether the Union was justified in expressing disapproval of the Soviet Union's actions. Instead, the Employer

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arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

sought to enjoin the Union's decision not to provide labor, a decision which the Employer believed violated the terms of the collective-bargaining agreement. It is this contract dispute, and not the political dispute, that the arbitrator will resolve, and on which the courts are asked to rule.

The language of the Norris-La Guardia Act does not except labor disputes having their genesis in political protests. Nor is there any basis in the statutory language for the argument that the Act requires that *each* dispute relevant to the case be a labor dispute. The Act merely requires that the case involve "any" labor dispute. Therefore, the plain terms of § 4(a) and § 13 of the Norris-La Guardia Act deprive the federal courts of the power to enjoin the Union's work stoppage in this § 301 action, without regard to whether the Union also has a nonlabor dispute with another entity.[10]

The conclusion that this case involves a labor dispute within the meaning of the Norris-La Guardia Act comports with this Court's consistent interpretation of that Act.[11] Our

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[10] Of course, there are exceptions to the Act's prohibitions against enjoining work stoppages. See, *e. g.*, *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970). The employer may obtain an injunction to enforce an arbitrator's decision that the strike violates the collective-bargaining agreement and can recover damages for the violation, pursuant to § 301 of the LMRA, 29 U. S. C. § 185. See, *e. g.*, *Buffalo Forge*, *supra*, at 405. See also *infra*, at 718–719, and n. 18 (discussing Board's authority under 29 U. S. C. §§ 160(k), 160(*l*), to petition for an injunction upon finding reasonable cause to believe that the strike is an unfair labor practice).

[11] The Employer's reliance on *Eastex, Inc.* v. *NLRB*, 437 U. S. 556 (1978), to argue that a politically motivated strike is not a labor dispute is misplaced. In *Eastex*, we addressed whether certain concerted activity was protected under § 7 of the NLRA, 29 U. S. C. § 157, and we recognized that "[t]here may well be types of conduct or speech that are so purely political or so remotely connected to the concerns of employees as employees as to be beyond the protection of [§ 7]." *Id.*, at 570, n. 20. Although the definition of a "labor dispute" in § 2(9) of the NLRA, 29 U. S. C. § 152(9), is virtually identical to that in § 13(c) of the Norris-La Guardia Act, 29 U. S. C. § 113(c), and the two provisions have been construed consistently with one another, *e. g.*, *United*

decisions have recognized that the term "labor dispute" must not be narrowly construed because the statutory definition itself is extremely broad and because Congress deliberately included a broad definition to overrule judicial decisions that had unduly restricted the Clayton Act's labor exemption from the antitrust laws. For example, in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U. S. 365, 369 (1960), the Court observed:

> "Th[e] Act's language is broad. The language is broad because *Congress was intent upon taking the federal courts out of the labor injunction business* except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act. The history and background that led Congress to take this view have been adverted to in a number of prior opinions of this Court in which we refused to give the Act narrow interpretations that would have restored many labor dispute controversies to the courts" (emphasis added; footnote omitted).

The critical element in determining whether the provisions of the Norris-La Guardia Act apply is whether "the employer-employee relationship [is] the matrix of the contro-

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States v. *Hutcheson*, 312 U. S. 219, 234, n. 4 (1941), this similarity does not advance the Employer's argument. Union activity that prompts a "labor dispute" within the meaning of these sections may be protected by § 7, prohibited by § 8(b), 29 U. S. C. § 158(b), or neither protected nor prohibited. The objective of the concerted activity is relevant in determining whether such activity is protected under § 7 or prohibited by § 8(b), but *not* in determining whether the activity is a "labor dispute" under § 2(9).

Moreover, the conclusion that a purely political work stoppage is not protected under § 7 means simply that the employer is not prohibited by § 8(a)(1) of the NLRA, 29 U. S. C. § 158(a)(1), from discharging or disciplining employees for this activity. It hardly establishes that no "labor dispute" existed within the meaning of § 2(9). Similarly, if the employees protested such sanctions under the collective-bargaining agreement, an arbitrator might ultimately conclude that the sanctions were proper, but this would not alter the obvious fact that the matter is a labor dispute.

versy." *Columbia River Packers Assn., Inc.* v. *Hinton*, 315 U. S. 143, 147 (1942). In this case, the Employer and the Union representing its employees are the disputants, and their dispute concerns the interpretation of the labor contract that defines their relationship.[12] Thus, the employer-employee relationship is the matrix of this controversy.

Nevertheless, the Employer argues that a "labor dispute" exists only when the Union's action is taken in its own "economic self-interest." The Employer cites *Musicians* v. *Carroll*, 391 U. S. 99 (1968), and *Columbia River Packers Assn., supra*, for this proposition. In these cases, however, the Court addressed the very different question whether the relevant parties were "labor" groups involved in a labor dispute for the purpose of determining whether their actions were exempt from the antitrust laws.[13] These cases do not hold

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[12] A labor dispute might be present under the facts of this case even in the absence of the dispute over the scope of the no-strike clause. Regardless of the political nature of the Union's objections to handling Soviet-bound cargo, these objections were expressed in a work stoppage by employees against their employer, which focused on particular work assignments. Thus, apart from the collective-bargaining agreement, the employer-employee relationship would be the matrix of the controversy. We need not decide this question, however, because this case does involve a dispute over the interpretation of the parties' collective-bargaining agreement.

[13] In *Musicians*, the Court held that, although orchestra leaders acted as independent contractors with respect to certain "club-date" engagements, the union's involvement with the leaders was not a combination with a nonlabor group in violation of the Sherman Act. In finding that the leaders were a "labor group," and a party to a labor dispute, the Court relied on the " 'presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors.' " 391 U. S., at 106 (quoting the opinion of the District Court). In *Columbia River Packers Assn.*, the Court found that the union was merely an association of independent fish sellers involved in a controversy with fish buyers over a contract for the sale of fish; they were not employees of the buyers, nor did they seek to be. 315 U. S., at 147.

The Employer's reliance on *Bakery Drivers* v. *Wagshal*, 333 U. S. 437 (1948), is similarly misplaced. In that case, the Court held only that a con-

that a union's noneconomic motive inevitably takes the dispute out of the Norris-La Guardia Act, but only that the protections of that Act do not extend to labor organizations when they cease to act as labor groups or when they enter into illegal combinations with nonlabor groups in restraint of trade.[14] Here, there is no question that the Union is a labor group, representing its own interests in a dispute with the Employer over the employees' obligation to provide labor.

Even in cases where the disputants did not stand in the relationship of employer and employee, this Court has held that the existence of noneconomic motives does not make the Norris-La Guardia Act inapplicable. For example, in *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938), this Court held that the Norris-La Guardia Act prohibited an injunction against picketing by members of a civic group, which was aimed at inducing a store to employ Negro employees. In determining that the group and its members were "persons interested in a labor dispute" within the meaning of § 13, the Court found it immaterial that the picketers, who were neither union organizers nor store employees, were not asserting economic interests commonly associated with labor unions—*e. g.*, terms and conditions of employment in the narrower sense of wages, hours, unionization, or betterment of working conditions. *Id.*, at 560. Although the lower courts found Norris-La Guardia inapplicable because the picketing was motivated by the group's "political" or "social" goals of improving the position of Negroes generally, and not by the desire to improve specific conditions of employment, this Court reasoned: "The Act does not concern it-

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troversy between two businessmen over delivery times or methods of payment does not become a labor dispute merely because a union representative, with or without his employer's consent, sought to obtain payment pursuant to a particular method. *Id.*, at 443–444.

[14] The Employer's economic-motive analysis also leads to the untenable result that strikes in protest of unreasonably unsafe conditions and some sympathy strikes are not "labor disputes."

self with the background or the motives of the dispute." *Id.*, at 561.

B

The Employer's argument that the Union's motivation for engaging in a work stoppage determines whether the Norris-La Guardia Act applies is also contrary to the legislative history of that Act. The Act was enacted in response to federal-court intervention on behalf of employers through the use of injunctive powers against unions and other associations of employees. This intervention had caused the federal judiciary to fall into disrepute among large segments of this Nation's population. See generally S. Rep. No. 163, 72d Cong., 1st Sess., 8, 16–18 (1932); 75 Cong. Rec. 4915 (1932) (remarks of Sen. Wagner).

Apart from the procedural unfairness of many labor injunctions, one of the greatest evils associated with them was the use of tort-law doctrines, which often made the lawfulness of a strike depend upon judicial views of social and economic policy. See, *e. g.*, Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mountain L. Rev. 247, 256 (1958). In debating the Act, its supporters repeatedly expressed disapproval of this Court's interpretations of the Clayton Act's labor exemption—interpretations which permitted a federal judge to find the Act inapplicable based on his or her appraisal of the "legitimacy" of the union's objectives.[15] See, *e. g.*, 75 Cong. Rec. 4916 (1932) (remarks of Sen. Wagner) (definition of labor dispute expanded to override *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921) (holding a strike and picketing with the purpose of unionizing a plant not a labor dispute because the objectives were not legitimate and there was no employer-employee relationship between the disputants)); 75 Cong. Rec., at

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[15] See *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 468–469 (1921). See also *Bedford Cut Stone Co.* v. *Stone Cutters*, 274 U. S. 37, 54–55 (1927).

5487–5488 (remarks of Rep. Celler) (bill brought forth to remedy decisions allowing injunction in *Duplex* and in *Bedford Cut Stone Co.* v. *Stone Cutters*, 274 U. S. 37 (1927) (holding that decision by workers not to work on nonunion goods not a labor dispute)). See also 75 Cong. Rec., at 4686 (remarks of Sen. Hebert) (Committee minority agreed that injunctions should not have issued in *Bedford* and *Duplex*). See generally H. R. Rep. No. 669, 72d Cong., 1st Sess., 8, 10–11 (1932). The legislative history is replete with criticisms of the ability of powerful employers to use federal judges as "strike-breaking" agencies; by virtue of their almost unbridled "equitable discretion," federal judges could enter injunctions based on their disapproval of the employees' objectives, or on the theory that these objectives or actions, although lawful if pursued by a single employee, became unlawful when pursued through the "conspiracy" of concerted activity. See, *e. g.*, 75 Cong. Rec., at 4928–4938, 5466–5468, 5478–5481, 5487–5490.

Furthermore, the question whether the Norris-La Guardia Act would apply to politically motivated strikes was brought to the attention of the 72d Congress when it passed the Act. Opponents criticized the definition of "labor dispute" in § 13(c) on the ground that it would cover politically motivated strikes. Representative Beck argued that federal courts should have jurisdiction to enjoin political strikes like those threatened by labor unions in Europe. *Id.*, at 5471–5473 (discussing threatened strike by British unions protesting the cancellation of leases held by Communist Party members, and threatened strikes by Belgian unions protesting a decision to supply military aid to Poland).[16] In response, Representative Oliver argued that the federal courts should not have the power to enjoin such strikes. *Id.*, at 5480–5481.

[16] The thrust of this objection was that the Act's definition of a labor dispute "takes no account whatever of the motives and purposes with which a nation-wide strike or boycott can be commenced and prosecuted." 75 Cong. Rec. 5472 (1932) (remarks of Rep. Beck).

Finally, Representative Beck offered an amendment to the Act that would have permitted federal courts to enjoin strikes called for ulterior purposes, including political motives. This amendment was defeated soundly. See *id.*, at 5507.

Further support for our conclusion that Congress believed that the Norris-La Guardia Act applies to work stoppages instituted for political reasons can be found in the legislative history of the 1947 amendments to the NLRA. That history reveals that Congress rejected a proposal to repeal the Norris-La Guardia Act with respect to one broad category of political strikes.[17] The House bill included definitions of various kinds of labor disputes. See H. R. 3020, 80th Cong., 1st Sess., § 2, 1 Legislative History of the LMRA 158, 160 (1947) (Leg. Hist.); H. R. Rep. No. 245, 80th Cong., 1st Sess., 1, 18–19 (1947), 1 Leg. Hist. 292, 309–310. Of relevance here, § 2(13) defined a "sympathy" strike as a strike "called or conducted not by reason of any dispute between the employer and the employees on strike or participating in such concerted interference, but rather by reason of either (A) a dispute involving another employer or other employees of the same employer, or (B) *disagreement with some governmental policy.*" H. R. 3020, § 2(13), 1 Leg. Hist. 168 (emphasis added). Section 12 of the House bill made this kind of strike "unlawful concerted activity," and "it remove[d] the immunities that the present laws confer upon persons who engage in them." H. R. Rep. No. 245, *supra*, at 23, 1 Leg. Hist.

[17] In relying on this history, we do not argue that congressional rejection of a broad repeal of the Norris-La Guardia Act precludes accommodation of that Act to the LMRA. See *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 204–210 (1962). In *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S., at 249, this Court put that argument to rest. Rather, we rely on this legislative history because it demonstrates that Congress believed that the Norris-La Guardia Act did apply to controversies concerning politically motivated work stoppages. Furthermore, in this case, unlike *Boys Markets*, we are not asked to accommodate the Norris-La Guardia Act to a specific federal Act or to the strong policy favoring arbitration.

314. In particular, the Norris-La Guardia Act would not apply to suits brought by private parties to enjoin such activity, and damages could be recovered. See H. R. Rep. No. 245, *supra*, at 23–24, 43–44, 1 Leg. Hist. 314–315, 334–335. In explaining these provisions, the House Report stated that strikes "against a policy of national or local government, which the employer cannot change," should be made unlawful, and that "[t]he bill makes inapplicable in such suits the Norris-La Guardia Act, which heretofore has protected parties to industrial strife from the consequences of their lawlessness." H. R. Rep. No. 245, *supra*, at 24, 44, 1 Leg. Hist. 315, 335.

The Conference Committee accepted the Senate version, which had eliminated these provisions of the House bill.[18] The House Managers' statement accompanying the Conference Report explained that its recommendation did not go as far as the House bill, that § 8(b) prohibits jurisdictional strikes and illegal secondary boycotts, and that the Board, *not private parties*, may petition a district court under § 10(k) or § 10(*l*) to enjoin these activities notwithstanding the provisions of the Norris-La Guardia Act. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36, 42–43, 57, 58–59 (1947), 1 Leg. Hist. 540, 546–547, 561, 562–563. In short, Congress declined in 1947 to adopt a broad "political motivation" exception to the Norris-La Guardia Act for strikes in protest of some governmental policy. Instead, if a strike of this nature

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[18] The Senate had declined to adopt these provisions of the House bill. The Senate Report explained that it did not want to impair labor's social gains under the Norris-La Guardia Act and the NLRA of 1935, but instead wanted to remedy "specific types of injustice" or "clear inequities" by "precise and carefully drawn legislation." S. Rep. No. 105, 80th Cong., 1st Sess., 1 (1947), 1 Leg. Hist. 407. Some of the concerted activities listed in § 12 of the House bill were made unfair labor practices, and the National Labor Relations Board, *not private parties*, could petition a district court for injunctions against certain unfair labor practices. See S. Rep. No. 105, *supra*, at 35, 40, 1 Leg. Hist., 441, 446 (reciting proposed revisions to NLRA, §§ 8(b), 10(k), 10(*l*)).

takes the form of a secondary boycott prohibited by § 8(b), Congress chose to give the Board, not private parties, the power to petition a federal district court for an injunction. See 29 U. S. C. §§ 160(k), 160(*l*). Cf. *Longshoremen* v. *Allied International, Inc.*, 456 U. S. 212 (1982).

C

This case, brought by the Employer to enforce its collective-bargaining agreement with the Union, involves a "labor dispute" within any common-sense meaning of that term. Were we to ignore this plain interpretation and hold that the political motivation underlying the work stoppage removes this controversy from the prohibitions of the Norris-La Guardia Act, we would embroil federal judges in the very scrutiny of "legitimate objectives" that Congress intended to prevent when it passed that Act. The applicability not only of § 4, but also of all of the procedural protections embodied in that Act, would turn on a single federal judge's perception of the motivation underlying the concerted activity.[19] The Employer's interpretation is simply inconsistent with the

[19] This proposed exception does not limit the judge's discretion to consideration of specified external conduct or of provisions in a collective-bargaining agreement, as does the *Boys Markets* exception. It provides no guidance to judges in dealing with concerted activity arguably designed to achieve both political and labor-related goals. Such mixed-motivation cases are bound to arise. For example, in *United States Steel Corp.* v. *United Mine Workers*, 519 F. 2d 1236 (CA5 1975), miners picketed another employer for importing coal from South Africa. The Court of Appeals held that the Norris-La Guardia Act applied, and that the *Boys Markets* exception was not available, because "the miners' action was not aimed at [their employer] at all, but rather at the national policy of this country's permitting the importation of South African coal." 519 F. 2d, at 1247 (footnote omitted). Under the political-motivation exception, even if the miners had picketed because slave labor was employed to mine the imported coal, the Norris-La Guardia Act might not apply. Minor variations in the facts would endow the courts with, or divest them of, jurisdiction to issue an injunction, and would create difficult line-drawing problems.

need, expressed by Congress when it enacted the Norris-La Guardia Act, for clear "mileposts for judges to follow." 75 Cong. Rec. 4935 (1932) (remarks of Sen. Bratton).

In essence, the Employer asks us to disregard the legislative history of the Act and to distort the definition of a labor dispute in order to reach what it believes to be an "equitable" result. The Employer's real complaint, however, is not with the Union's political objections to the conduct of the Soviet Union, but with what the Employer views as the Union's breach of contract. The Employer's frustration with this alleged breach of contract should not be remedied by characterizing it as other than a labor dispute. We will not adopt by judicial fiat an interpretation that Congress specifically rejected when it enacted the 1947 amendments to the NLRA. See generally n. 17, *supra*. In the past, we have consistently declined to constrict Norris-La Guardia's broad prohibitions except in narrowly defined situations where accommodation of that Act to specific congressional policy is necessary. We refuse to deviate from that path today.

IV

Alternatively, the Employer argues that the Union's work stoppage may be enjoined under the rationale of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970), and *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976), because the dispute underlying the work stoppage is arbitrable under the collective-bargaining agreement. In making this argument, the Employer disavows its earlier argument that the underlying dispute is purely political, and asserts that the Union's work stoppage was motivated by a disagreement with the Employer over the management-rights clause in the collective-bargaining agreement. The Solicitor General, in an *amicus* brief filed on behalf of the United States, agrees with the Employer that the work stoppage may be enjoined pending arbitration. He contends that in addition to the political dispute, disputes concerning both the management-rights

clause and the work-conditions clause underlie the work stoppage, and that at least one of these disputes is arguably arbitrable.[20]

We disagree. *Buffalo Forge* makes it clear that a *Boys Markets* injunction pending arbitration should not issue unless the dispute underlying the work stoppage is arbitrable. The rationale of *Buffalo Forge* compels the conclusion that the Union's work stoppage, called to protest the invasion of Afghanistan by the Soviet Union, may not be enjoined pending the arbitrator's decision on whether the work stoppage violates the no-strike clause in the collective-bargaining agreement. The underlying dispute, whether viewed as an expression of the Union's "moral outrage" at Soviet military policy or as an expression of sympathy for the people of Afghanistan, is plainly not arbitrable under the collective-bargaining agreement.

The attempts by the Solicitor General and the Employer to characterize the underlying dispute as arbitrable do not withstand analysis. The "underlying" disputes concerning the management-rights clause or the work-conditions clause simply did not trigger the work stoppage. To the contrary, the applicability of these clauses to the dispute, if any, was triggered by the work stoppage itself. Consideration of

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[20] The management-rights clause provides:

"The Management of the Employer's business and the direction of the work force in the operation of the business are exclusively vested in the Employer as functions of Management. Except as specifically provided in the Agreement, all of the rights, powers, and authority Employer had prior to signing of this Agreement are retained by the Employer."

The work-conditions clause provides:

"Where hardship is claimed by the Union because of unreasonable or burdensome conditions or where work methods or operations materially change in the future, the problem shall first be discussed between the local and Management involved. In the event an agreement cannot be reached, either party may refer the dispute to the Joint Negotiating Committee and, if the matter cannot be resolved by that Committee, either party may then refer the question to an arbitrator in accordance with the procedure set forth in Clause 15(B)."

whether the strike intruded on the management-rights clause or was permitted by the work-conditions clause may inform the arbitrator's ultimate decision on whether the strike violates the no-strike clause. Indeed, the question whether striking over a nonarbitrable issue violates other provisions of the collective-bargaining agreement may itself be an arbitrable dispute. The fact remains, however, that the strike itself was not over an arbitrable dispute and therefore may not be enjoined pending the arbitrator's ruling on the legality of the strike under the collective-bargaining agreement.

The weaknesses in the analysis of the Employer and the Solicitor General can perhaps best be demonstrated by applying it to a pure sympathy strike, which clearly cannot be enjoined pending arbitration under the rationale of *Buffalo Forge*. If this work stoppage were a pure sympathy strike, it could be characterized alternatively as a dispute over the Employer's right to choose to do business with the employer embroiled in a dispute with a sister union, as a dispute over management's right to assign and direct work, or as a dispute over whether requiring the union to handle goods of the employer whose employees are on strike is an unreasonable work condition.[21] None of these characterizations, however, alters the fact, essential to the rationale of *Buffalo Forge*, that the strike was not over an arbitrable issue and therefore did not directly frustrate the arbitration process.

The Employer's argument that this work stoppage may be enjoined pending arbitration really reflects a fundamental

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[21] In fact, the employer in *Buffalo Forge* made just such a claim. In addition to alleging breach of the no-strike clause, it claimed that the strike was caused by "refusal to follow a supervisor's instructions to cross the . . . picket line." *Buffalo Forge*, 428 U. S., at 401. The District Court found that the strike was in sympathy with the sister union and was not over a dispute that the parties were contractually bound to arbitrate. *Id.*, at 402–403. On appeal, the employer did not press its argument that the work stoppage was in part a protest over truckdriving assignments. *Id.*, at 403, n. 8.

disagreement with the rationale of *Buffalo Forge*, and not a belief that this rationale permits an injunction in this case. The Employer apparently disagrees with the *Buffalo Forge* Court's conclusion that, in agreeing to broad arbitration and no-strike clauses, the parties do not bargain for injunctive relief to restore the status quo pending the arbitrator's decision on the legality of the strike under the collective-bargaining agreement, without regard to what triggered the strike. Instead, they bargain only for specific enforcement of the union's promise to arbitrate the underlying grievance before resorting to a strike. See 428 U. S., at 410–412. The Employer also apparently believes that *Buffalo Forge* frustrates the arbitration process and encourages industrial strife. But see *id.*, at 412.[22] However, this disagreement with *Buffalo Forge* only argues for reconsidering that decision.[23] It does not justify distorting the rationale of that case beyond recognition in order to reach the result urged by the Employer.

V

In conclusion, we hold that an employer's § 301 action to enforce the provisions of a collective-bargaining agreement allegedly violated by a union's work stoppage involves a "labor dispute" within the meaning of the Norris-La Guardia Act, without regard to the motivation underlying the union's

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[22] The Employer argues that industrial strife is encouraged because employers are given the incentive to discharge or discipline the workers for refusing to work, which is likely to precipitate further strikes. According to this argument, the strike, which began over a nonarbitrable dispute, is transformed into a dispute over an arbitrable issue, *i. e.*, the employer's right under the collective-bargaining agreement to discipline these workers, and may be enjoined under the *Boys Markets/Buffalo Forge* exception. See, *e. g.*, *Complete Auto Transit, Inc.* v. *Reis*, 614 F. 2d 1110, 1113–1114 (CA6 1980), aff'd on other grounds, 451 U. S. 401 (1981). This Court has not addressed the validity of this "transformation" analysis. See *Complete Auto Transit, Inc.* v. *Reis*, 451 U. S., at 405, n. 4.

[23] The Employer has also requested that we reconsider our decision in *Buffalo Forge Co.* v. *Steelworkers*. We decline this invitation.

decision not to provide labor. Under our decisions in *Boys Markets* and *Buffalo Forge*, when the underlying dispute is not arbitrable, the employer may not obtain injunctive relief pending the arbitrator's ruling on the legality of the strike under the collective-bargaining agreement. Accordingly, the decision of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR, concurring in the judgment.

Based on the legislative history of the Norris-La Guardia Act, 29 U. S. C. § 101 *et seq.*, and our previous cases interpreting it, *e. g.*, *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938), the Court correctly concludes that this case involves a labor dispute within the meaning of § 4 of the Act, 29 U. S. C. § 104. The Court also correctly determines that under *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976), no injunction may issue pending arbitration because the underlying political dispute is not arbitrable under the collective-bargaining agreement. Unless the Court is willing to overrule *Buffalo Forge*, the conclusion reached by the Court in this case is inescapable. Therefore, I concur in the judgment.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL joins, dissenting.

I

This case in no sense involves or grows out of a labor dispute as that term is defined in § 13(c) of the Norris-La Guardia Act, 29 U. S. C. § 113(c). See *ante*, at 709–710, n. 9. Section 13(c) defines a labor dispute as "any controversy concerning terms or conditions of employment . . . ."[1] The dispute in this case is a political dispute and has no relation to any controversy concerning terms or conditions of em-

[1] Section 13(c) also includes union organizational activity within its definition of labor dispute, but this case clearly does not involve such activity.

ployment. If Congress had intended to bar federal courts from issuing injunctions in political disputes, it could have simply prohibited federal courts from enjoining strikes rather than limiting its prohibition to controversies concerning terms or conditions of employment. Accordingly, I disagree with the Court's conclusion that the Norris-La Guardia Act bars a federal court from enjoining this politically motivated work stoppage.

The International Longshoremen's Association objects to the Soviet Union's invasion of Afghanistan. As a consequence, it announced that it would not handle any cargo bound to, or coming from, the Soviet Union, or any cargo carried on Soviet ships. This case commenced after the union, pursuant to its political position, refused to load superphosphoric acid onto certain ships bound for the Soviet Union. The union has no objection to any terms or conditions of employment; it would have loaded the superphosphoric acid on any non-Soviet ship bound for a destination other than the Soviet Union. No one has suggested that the union's action is actually motivated to obtain concessions concerning employment conditions. The union refused to handle the cargo simply because a foreign country invaded a neighboring country and the union desired to express its opposition to the invasion. Thus the plain meaning of § 13(c) leads to the conclusion that this case does not involve or grow out of a labor dispute because the union members are not seeking to change their terms or conditions of employment.

As the Court recognizes, we have held that the test of whether the Norris-La Guardia Act applies is whether "the employer-employee relationship [is] the matrix of the controversy." *Columbia River Packers Assn., Inc.* v. *Hinton*, 315 U. S. 143, 147 (1942); quoted *ante*, at 712–713. Federal Courts of Appeals have stated that unions are protected by the Norris-La Guardia Act when they act to advance the economic interests of their members. See, *e. g.*, *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F. 2d

649, 654 (CA5 1966). These cases illustrate the plain meaning of § 13(c)'s definition of labor dispute—the Norris-La Guardia Act protects union organizational efforts and efforts to improve working conditions.

The Court errs gravely in finding that the matrix of this controversy is the union's relationship with the petitioners. The union's dispute with the petitioners merely flows from its decision to demonstrate its opposition to the invasion of Afghanistan. No economic interests of union members are involved; indeed, the union's policy is contrary to its members' economic interests since it reduces the amount of available work.[2] Thus, the cases generally explicating the meaning of § 13(c) lend no support to the notion that this case involves a labor dispute.

The federal courts have consistently recognized that the Norris-La Guardia Act does not apply to politically motivated work stoppages concerning subjects over which employers have no control. These courts, in cases which are for all practical purposes indistinguishable from this case—and which often involved the International Longshoremen's Association—properly concluded that the Act only applies to economic disputes.[3] This Court has never before held, as it

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[2] The Court's reliance on *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938), is misplaced. *Ante*, at 714–715. The picketers in that case might not have been seeking to better their own personal economic position, but their purpose was to affect the terms and conditions of employment of the picketed store, since their object was to persuade the store to employ Negroes. Section 13(c) explicitly states that the coverage of the Act does not depend on whether "the disputants stand in the proximate relation of employer and employee." *Ante*, at 710, n. 9.

[3] See *Khedivial Line, S. A. E.* v. *Seafarers International Union*, 278 F. 2d 49, 50–51 (CA2 1960) (politically motivated blacklist of Egyptian ships to retaliate for Egyptian blacklist of American ships that dealt with Israel is not "labor dispute" triggering Norris-La Guardia); *West Gulf Maritime Assn.* v. *International Longshoremen's Assn.*, 413 F. Supp. 372 (SD Tex. 1975), summarily aff'd, 531 F. 2d 574 (CA5 1976) (union's refusal, on political grounds, in violation of a no-strike agreement, to load grain on a ship bound for the Soviet Union does not present a "labor dispute").

holds here, that the Norris-La Guardia Act protects strikes resulting from political disputes rather than from labor disputes. Since the meaning of the words of the statute is plain, and since the applicable precedent supports the conclusion that this is not a labor dispute, we ought to conclude that politically motivated strikes are outside the coverage of the Norris-La Guardia Act.[4]

Finally, the Court argues that a common-sense interpretation of the meaning of the term "labor dispute" supports its conclusion. But the "common-sense" meaning of a term is not controlling when Congress has provided, as it provided in § 13(c), an explicit definition of a labor dispute. "Common sense" and legislative history ought not change the meaning of the unambiguous words of a statute. It is not contended that any act of petitioners to improve the terms or conditions

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[4]The excerpts from the legislative history relied upon by the Court fall short of the clear evidence required to overcome the plain language of § 13(c). See, *e. g.*, *Bread Political Action Committee* v. *FEC*, 455 U. S. 577, 581 (1982). In 1947, Congress declined to amend the federal labor laws so that strikes protesting "disagreement with some governmental policy" would not be protected by the Norris-La Guardia Act. H. R. 3020, 80th Cong., 1st Sess., § 2(13)(B) (1947), 1 Legislative History of the LMRA 168 (1947); *ante*, at 717. However, the language of the rejected House version of the amendment was quite broad. There are cases in which unions might disagree with governmental policy and properly take collective action protesting it in order to advance the legitimate economic interests of union members if the terms or conditions of their employment would be affected. Congress might have rejected the House version because of fear that its broad reach would render legitimate union activity unprotected.

In 1932, Congress rejected an amendment which would have permitted federal courts to enjoin acts "performed or threatened for an unlawful purpose or with an unlawful intent . . . ." 75 Cong. Rec. 5507 (1932); *ante*, at 716–717. This amendment would have swept more broadly than the plain language of § 13(c) as adopted. Indeed, Representative Beck's amendment could have rendered the Norris-La Guardia Act a nullity, since federal judges in the 1930's would have been able to enjoin a strike merely by finding it motivated by an "unlawful purpose." Thus the legislative history does not lead to or compel a conclusion in this case contrary to the plain language of § 13(c).

of employment would have persuaded the union to load the ships. Hence there is no labor dispute under the Norris-La Guardia Act.

II

This case, together with our recent decision in *Longshoremen* v. *Allied International, Inc.*, 456 U. S. 212 (1982), illustrates the inherent flaw in the holding in *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976). If the Court cannot give to ordinary words their ordinary meaning and grasp that the dispute in this case is a purely political dispute rather than having any relation to a labor dispute, it should overrule *Buffalo Forge*.

The controversy in *Allied International* also resulted from the International Longshoremen's Association's protest over the Soviet invasion of Afghanistan. There we held that the union's refusal to unload shipments from the Soviet Union was a secondary boycott prohibited by § 8(b)(4) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4). The union is therefore liable for damages as a result of its refusal to unload the shipments. Yet the Court today holds that the union may not be enjoined from refusing to load cargo onto ships bound for the Soviet Union.

This is all the more perplexing because the union entered into an agreement with petitioners which contained an unequivocal no-strike clause: "During the term of this Agreement, . . . the Union agrees there shall not be any strike *of any kind* or degree whatsoever, . . . for *any cause whatsoever*." (Emphasis added.) *Ante*, at 706. In *Allied International* this union was found liable for damages caused to a party with which it had no such agreement. Here, however, despite the existence of the no-strike agreement between petitioners and the union, the Court holds that the union's illegal acts may not be enjoined.

To reach this strange result, the Court first decides that this case involves a labor dispute rather than a political dispute, and therefore is within the scope of the Norris-

La Guardia Act. The Court then contradicts itself and concludes that, since the dispute is really a political protest over Soviet aggression, it may not be enjoined under the *Buffalo Forge* exception to the rule of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970), since a federal court cannot resolve the actual dispute. This case, together with *Allied International*, persuades me that the artificial *Buffalo Forge* exception should be abolished. Rather than continuing to engage in mechanical and contradictory analyses as to the character of disputes such as this one, we should hold that a federal court may enjoin a strike pending arbitration when the striking union has agreed to a contract with a no-strike clause such as the one agreed to by petitioners and the ILA. That is what we seemed to hold in *Boys Markets*, and we should not have tinkered with that holding in *Buffalo Forge*.

There is no rational way to reconcile this holding with *Allied International*. If we must overrule *Buffalo Forge* to come to a consistent result, we should do so.

JUSTICE POWELL, dissenting.

The no-strike clause agreed to by the parties in this case could scarcely be more emphatic: "During the term of this Agreement, . . . the Union agrees there shall not be any strike of any kind or degree whatsoever, . . . for *any cause whatsoever*" (emphasis added). *Ante*, at 706. Such a clause is one of the most significant provisions in the bargaining agreement. One can fairly assume that the employer gave considerable ground in other areas of the agreement to gain this apparent guarantee that all disagreements would go first to arbitration. Thus, under the plain language of the agreement of the parties, the strike by the respondents should have been enjoined pending arbitration.

But in labor law—since this Court's decision in *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976)—plain language agreed to by a union does not bind it. *Buffalo Forge* is an aberration. It cannot be reconciled with labor law pol-

icy of encouraging industrial peace through arbitration. It severely undercuts *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970). In a word, *Buffalo Forge* should be overruled.

The internal contradictions in today's decision by the Court further illustrate absence of principle in *Buffalo Forge*'s reasoning. The Court argues that now we must divide the dispute in this case into the "underlying" dispute over Soviet policy and the "other" dispute over the scope of the no-strike clause. I consider this method of analysis artificial and unprincipled. On the one hand, the Court must characterize the dispute in this case as a labor dispute—involving the scope of the no-strike clause—to bring the dispute within the scope of the Norris-La Guardia Act. But on the other hand, *Buffalo Forge* requires the Court to contradict itself by insisting that the dispute is "really" over Soviet aggression and therefore that the rule of *Boy's Market*, and the federal policy in support of arbitration, are inapplicable.

The Court should not have it both ways. So long as it adheres to the aberrant analysis in *Buffalo Forge*, I agree with THE CHIEF JUSTICE that the dispute in this case must be viewed as a political dispute outside the scope of the Norris-La Guardia Act. I therefore join his dissenting opinion.

JUSTICE STEVENS, dissenting.

For the reasons stated in Part I of THE CHIEF JUSTICE's dissenting opinion in this case, as well as the reasons stated in Part I of my dissenting opinion in *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397, 415–424, I respectfully dissent.

NIXON *v.* FITZGERALD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1738. Argued November 30, 1981—Decided June 24, 1982

During the waning months of the Presidency of Lyndon B. Johnson in 1968, respondent, a management analyst with the Department of the Air Force, testified before a congressional Subcommittee about cost-overruns and unexpected technical difficulties concerning the development of a particular airplane. In January 1970, during the Presidency of petitioner Richard M. Nixon, respondent was dismissed from his job during a departmental reorganization and reduction in force, in which his job was eliminated. Respondent complained to the Civil Service Commission, alleging that his separation represented unlawful retaliation for his congressional testimony. The Commission rejected this claim, but concluded that respondent's dismissal offended applicable regulations because it was motivated by "reasons purely personal to" respondent. Respondent thereafter filed suit for damages in Federal District Court against various Defense Department officials and White House aides allegedly responsible for his dismissal. An amended complaint later named petitioner as a defendant. After earlier judicial rulings and extensive pretrial discovery, only three defendants were involved: petitioner and two White House aides (petitioners in *Harlow* v. *Fitzgerald*, *post*, p. 800). Denying the defendants' motion for summary judgment, the court held that respondent had stated triable causes of action under two federal statutes and the First Amendment, and that petitioner was not entitled to claim absolute Presidential immunity. Petitioner took a collateral appeal of the immunity decision to the Court of Appeals, which dismissed summarily.

Held:

1. This Court has jurisdiction to determine the immunity question. Pp. 741–744.

(a) The case was "in" the Court of Appeals for purposes of 28 U. S. C. § 1254, which authorizes this Court's review of "[c]ases in" the courts of appeals. The Court of Appeals here dismissed the appeal for lack of jurisdiction. However, petitioner's appeal to the Court of Appeals falls within the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, as raising a "serious and unsettled

question" of law. Although the Court of Appeals had previously ruled in another case that the President was not entitled to absolute immunity, this Court had never so held. Pp. 741–743.

(b) Nor was the controversy mooted by an agreement to liquidate damages entered into between the parties after the petition for certiorari was filed and respondent had entered his opposition. Under the terms of the agreement, petitioner paid respondent $142,000; respondent agreed to accept liquidated damages of $28,000 if this Court ruled that petitioner was not entitled to absolute immunity; and no further payments would be made if the decision upheld petitioner's immunity claim. The limited agreement left both parties with a considerable financial stake in the resolution of the question presented in this Court. Cf. *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363. Pp. 743–744.

2. Petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. Pp. 744–758.

(a) Although there is no blanket recognition of absolute immunity for all federal executive officials from liability for civil damages resulting from constitutional violations, certain officials—such as judges and prosecutors—because of the special nature of their responsibilities, require absolute exemption from liability. Cf. *Butz* v. *Economou*, 438 U. S. 478. Determination of the immunity of particular officials is guided by the Constitution, federal statutes, history, and public policy. Pp. 744–748.

(b) The President's absolute immunity is a functionally mandated incident of his unique office, rooted in the constitutional tradition of the separation of powers and supported by the Nation's history. Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. While the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President, a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. The exercise of jurisdiction is not warranted in the case of merely private suits for damages based on a President's official acts. Pp. 748–754.

(c) The President's absolute immunity extends to all acts within the "outer perimeter" of his duties of office. Pp. 755–757.

(d) A rule of absolute immunity for the President does not leave the Nation without sufficient protection against his misconduct. There remains the constitutional remedy of impeachment, as well as the deterrent effects of constant scrutiny by the press and vigilant oversight by Congress. Other incentives to avoid misconduct may include a desire to

earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature. Pp. 757–758.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 758. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 764. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 797.

Herbert J. Miller, Jr., argued the cause for petitioner. With him on the briefs was *R. Stan Mortenson*.

John E. Nolan, Jr., argued the cause for respondent. With him on the brief were *Samuel T. Perkins* and *Arthur B. Spitzer*.*

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in

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**Louis Alan Clark* filed a brief for the Government Accountability Project of the Institute for Policy Studies as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Solicitor General Lee* for the United States; by *Roger J. Marzulla* and *William H. Mellor III* for the Mountain States Legal Foundation; by *John C. Armor* and *H. Richard Mayberry* for the National Taxpayers Legal Fund, Inc.; and by *Thomas J. Madden* for Senator Orrin G. Hatch et al.

which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the Armed Forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the Presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the evident embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C–5A transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently,

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[1] See Economics of Military Procurement: Hearings before the Subcommittee on Economy in Government of the Joint Economic Committee, 90th Cong., 2d Sess., pt. I, pp. 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209a–211a (memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings before the Subcommittee on Economy in Government of the Joint Economic Committee, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the

as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from Government service.[3] The President responded by promising to look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H. R. Haldeman to arrange for Fitzgerald's assignment to another job within the administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "'Fitzgerald is no doubt a top-notch cost expert, but he must be given very low

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"firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269a (memorandum of Patrick Buchanan to Richard Nixon, Dec. 5, 1969). The memorandum suggested that the President order Fitzgerald's retention by the Defense Department.

[4] *Id.*, at 228a.

[5] See *id.*, at 109a–112a (deposition of H. R. Haldeman); *id.*, at 137a–141a (deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. *Id.*, at 275a.

[6] See *id.*, at 126a (deposition of Robert Mayo); *id.*, at 141a (deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high-level positions were presently unavailable within the Bureau of the Budget. See *id.*, at 126a (deposition of Robert Mayo); *id.*, at 146a–147a (deposition of James Schlesinger).

marks in loyalty; and after all, loyalty is the name of the game.'"[8] Butterfield therefore recommended that "'[w]e should let him bleed, for a while at least.'"[9] There is no evidence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional Committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 152 U. S. App. D. C. 1, 467 F. 2d 755 (1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before

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[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (Sept. 18, 1973) *(CSC Decision)*, reprinted in App. 60a, 84a. (Page citations to the *CSC Decision* refer to the cited page in the Joint Appendix.)

[9] *Id.*, at 85a. The memorandum added that "'[w]e owe "first choice on Fitzgerald" to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns].'" Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra:*

"While Mr. Fitzgerald has denied that he was 'Senator Proxmier's *[sic]* boy in the Air Force', and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without specifically saying so, considered him to be just that. . . . We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]." App. 83a.

[10] *Id.*, at 61a.

Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision

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[11] See *id.*, at 83a–84a.

[12] See *ibid.*

[13] *Id.*, at 185a. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. *Id.*, at 214a–215a (recorded conversation of Jan. 31, 1973).

[14] *Id.*, at 196a (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see n. 13, *supra*, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." *Id.*, at 218a (recorded conversation of Jan. 31, 1973). See *id.*, at 220a. It was after this conversation that the retraction was ordered.

in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, as reprinted in App. 60a. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. *Id.*, at 86a–87a.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job, though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. *Id.*, at 86a. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17]

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[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 152 U. S. App. D. C. 1, 4, 467 F. 2d 755, 758 (1972); see *CSC Decision*, App. 63a–64a. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans' Preference Act. See 152 U. S. App. D. C., at 4–14, 467 F. 2d, at 758–768. Among these were the benefits of the reduction-in-force procedures established by civil service regulation. See *id.*, at 4, 467 F. 2d, at 758.

[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. App. 86a–87a. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" *Id.*, at 83a. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86a, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR pt. 752 (1982), implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87a.

[17] The Commission also ordered that Fitzgerald should receive backpay. *Id.*, at 87a–88a. Following the Commission's order, respondent was offered a new position with the Defense Department, but not one that he regarded as equivalent to his former employment. Fitzgerald accordingly filed an enforcement action in the District Court. This litigation ultimately culminated in a settlement agreement. Under its terms the United States Air Force agreed to reassign Fitzgerald to his former position as Management Systems Deputy to the Assistant Secretary of the Air

The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence of record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81a.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight officials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's 3-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (DC 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 180 U. S. App. D. C. 75, 553 F. 2d 220 (1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dismissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the administration. *Id.*, at 80, 84, 553 F. 2d, at 225, 229. Holding that concealment of illegal activ-

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Force, effective June 21, 1982. See Settlement Agreement in *Fitzgerald* v. *Hampton et al.*, Civ. No. 76–1486 (DC June 15, 1982).

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

ity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a second amended complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[19] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[20] The court also

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[19] The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint in *Fitzgerald* v. *Butterfield*, Civ. No. 74–78 (DC), p. 6.

[20] See App. to Pet. for Cert. 1a–2a. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (1976 ed., Supp. IV), provides generally that "[t]he right of employees . . . to . . . furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law

ruled that petitioner was not entitled to claim absolute Presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 196 U. S. App. D. C. 285, 606 F. 2d 1192 (1979), aff'd in pertinent part by an equally divided Court, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 959 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to the petition for certiorari, respondent argued that this Court is without jurisdiction to review the nonfinal order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the peti-

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of the District of Columbia, but respondent subsequently abandoned his common-law cause of action. See Supplemental Brief in Opposition 2.

[21] See Brief in Opposition 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

tioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, at 546–547. As an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must "presen[t] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 186 U. S. App. D. C. 179, 227–229, 569 F. 2d 10, 58–60 (1977) (Wilkey, J., dissenting on the appealability issue); *McSurely* v. *McClellan*, 172 U. S. App. D. C. 364, 372, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 180 U. S. App. D. C. 101, 107–108, n. 18, 553 F. 2d 1277, 1283–1284, n. 18 (1976), cert. dism'd *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay

outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not entitled to absolute immunity, this Court never had so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for certiorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his brief in opposition to a motion of

its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration, Fitzgerald agreed to accept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract: "Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 371 (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise

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Morton, Ina, David, Mark, and Gary Halperin to intervene and for other relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint." *Id.*, at 498.

Decisions subsequent to *Spalding* have extended the defense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions

with independence and without fear of consequences.'" *Id.*, at 554, quoting *Scott* v. *Stansfield*, L. R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." 386 U. S., at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a § 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith." This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Econo-*

mou, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common-law torts, that all high federal officials have a right to absolute immunity from constitutional damages actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, *id.*, at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, "because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law. See *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, *supra*, at 421. This Court necessarily also has weighed concerns of public policy, especially as illuminated

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[25] *Spalding* v. *Vilas*, 161 U. S. 483 (1896), was distinguished on the ground that the suit against the Postmaster General had asserted a common-law—and not a constitutional—cause of action. See *Butz* v. *Economou*, 438 U. S., at 493–495.

by our history and the structure of our government. See, *e. g.*, *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, *supra*, at 421; *Spalding* v. *Vilas*, 161 U. S., at 498.[26]

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the inquiries into history and policy, though mandated independently by our cases, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

IV

Here a former President asserts his immunity from civil damages claims of two kinds. He stands named as a defendant in a direct action under the Constitution and in two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

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[26] Although the Court in *Butz* v. *Economou*, *supra*, at 508, described the requisite inquiry as one of "public policy," the focus of inquiry more accurately may be viewed in terms of the "inherent" or "structural" assumptions of our scheme of government.

[27] In the present case we therefore are presented only with "implied" causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States. This approach accords with this Court's settled policy of avoiding unnecessary decision of constitutional issues. Reviewing this case under the "collateral order" doctrine, see *supra*, at 742, we assume for purposes of this opinion that private causes of action may be inferred both under the First Amendment and the two statutes on which respondent relies. But it does not follow that we

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. Justice Story's analysis remains persuasive:

> "There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418–419 (1st ed. 1833).

A

The President occupies a unique position in the constitutional scheme. Article II, § 1, of the Constitution provides that "[t]he executive Power shall be vested in a President of

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must—in considering a *Bivens* (*Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)) remedy or interpreting a statute *in light of the immunity doctrine*—assume that the cause of action runs against the President of the United States. Cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951) (construing § 1983 in light of the immunity doctrine, the Court could not accept "that Congress . . . would impinge on a tradition [of legislative immunity] so well grounded in history and reason by covert inclusion in the general language before us," and therefore would not address issues that would arise if Congress had undertaken to deprive state legislators of absolute immunity). Consequently, our holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us.

the United States . . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take Care that the Laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret";[29] and management of the Executive Branch—a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g., Butz* v. *Economou*, 438 U. S. 478 (1978); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974). We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[31]

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[28] U. S. Const., Art. II, § 3.

[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U. S. 103, 111 (1948).

[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Noting that the Speech and Debate Clause provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of executive immunity. This argument is unpersuasive. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g., Bradley* v. *Fisher*, 13 Wall. 335 (1872); *Stump* v. *Sparkman*, 435 U. S. 349 (1978). Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (extending immunity to prosecutorial

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—

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officials within the Executive Branch). Third, there is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Federal Convention of 1787, p. 64 (1911) (remarks of Gouverneur Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice President John Adams—both delegates to the Convention—that "the President, personally, was not the subject to any process whatever . . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." Journal of William Maclay 167 (E. Maclay ed. 1890). Justice Story, writing in 1833, held it implicit in the separation of powers that the President must be permitted to discharge his duties undistracted by private lawsuits. 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418–419 (1st ed. 1833) (quoted *supra*, at 749). Thomas Jefferson also argued that the President was not intended to be subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807), that a subpoena *duces tecum* can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President: "The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404 n. (P. Ford ed. 1905) (quoting a letter

for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings." *Pierson* v. *Ray*, 386 U. S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.[32] Nor can the sheer prominence of the President's

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from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original).

See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

In light of the fragmentary character of the most important materials reflecting the Framers' intent, we do think that the most compelling arguments arise from the Constitution's separation of powers and the Judiciary's historic understanding of that doctrine. See text *supra*. But our primary reliance on constitutional structure and judicial precedent should not be misunderstood. The best historical evidence clearly supports the Presidential immunity we have upheld. JUSTICE WHITE's dissent cites some other materials, including ambiguous comments made at state ratifying conventions and the remarks of a single publicist. But historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth. Other powerful support derives from the actual history of private lawsuits against the President. Prior to the litigation explosion commencing with this Court's 1971 *Bivens* decision, fewer than a handful of damages actions ever were filed against the President. None appears to have proceeded to judgment on the merits.

[32] Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950), "[t]he justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the

office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.[33] Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

B

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint.[34] For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege,[35] we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S., at 708. It is settled law that the separation-of-powers doctrine does not bar every exercise of juris-

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burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute . . . ."

[33] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[34] This tradition can be traced far back into our constitutional history. See, *e. g.*, *Mississippi* v. *Johnson*, 4 Wall. 475, 501 (1866) ("[W]e are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us"); *Kendall* v. *United States*, 12 Pet. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power").

[35] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F. R. D. 318, 323–324 (DC 1966), aff'd *sub nom. V. E. B. Carl Zeiss, Jena* v. *Clark*, 128 U. S. App. D. C. 10, 384 F. 2d 979, cert. denied, 389 U. S. 952 (1967) (Department of Justice officials).

diction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 F. Cas. 187, 191, 196 (No. 14,694) (CC Va. 1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[36] But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977); *United States* v. *Nixon*, *supra*, at 703–713. When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, or to vindicate the public interest in an ongoing criminal prosecution, see *United States* v. *Nixon*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[37]

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[36] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct Presidential order. See 343 U. S., at 583.

[37] The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, 418 U. S., at 711–712, and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision). It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But, contrary to the suggestion of JUSTICE WHITE's dissent, it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong. The dissent's objections on this ground would weigh equally against absolute immunity for any official. Yet the dissent makes no attack on the absolute immunity recognized for judges and prosecutors.

Our implied-rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong. These cases establish that victims of statutory crimes ordinarily may not sue in federal

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In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office. See *Butz* v. *Economou*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, 424 U. S., at 430–431. But the Court also has refused to draw functional lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, 360 U. S. 564, 575 (1959) (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege ap-

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court in the absence of expressed congressional intent to provide a damages remedy. See, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353 (1982); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981); *California* v. *Sierra Club*, 451 U. S. 287 (1981). JUSTICE WHITE does not refer to the jurisprudence of implied rights of action. Moreover, the dissent undertakes no discussion of cases in the *Bivens* line in which this Court has suggested that there would be no damages relief in circumstances "counseling hesitation" by the judiciary. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*, at 396; *Carlson* v. *Green*, 446 U. S. 14, 19 (1980) (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate").

Even the case on which JUSTICE WHITE places principal reliance, *Marbury* v. *Madison*, 1 Cranch 137 (1803), provides dubious support at best. The dissent cites *Marbury* for the proposition that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163. Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, *lost* his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim. In this case it was clear at least that Fitzgerald was entitled to seek a remedy before the Civil Service Commission—a remedy of which he availed himself. See *supra*, at 736–739, and n. 17.

plicable . . ."); *Stump* v. *Sparkman*, 435 U. S., at 363, and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable "functions" encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the kind of "functional" theory asserted both by respondent and the dissent. Inquiries of this kind could be highly intrusive.

Here respondent argues that petitioner Nixon would have acted outside the outer perimeter of his duties by ordering the discharge of an employee who was lawfully entitled to retain his job in the absence of "'such cause as will promote the efficiency of the service.'" Brief for Respondent 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within the outer perimeter of his duties of office, cause Fitzgerald to be dismissed without satisfying this standard in prescribed statutory proceedings.

This construction would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's constitutional and statutory authority to prescribe the manner in which the Secretary will conduct the business of the Air Force. See 10 U. S. C. § 8012(b). Because this mandate of office must include the authority to prescribe reorganizations and reductions in force, we conclude that petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

V

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive.[38] There remains the constitutional remedy of impeachment.[39] In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[40] Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

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[38] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g., Imbler* v. *Pachtman*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs").

[39] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L. J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S. Const., Art. I, § 5, cl. 2.

[40] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon, President of the United States, H. R. Rep. No. 93–1305 (1974).

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law."[41] For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed, and the case is remanded for action consistent with this opinion.

So ordered.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore that the Presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers. Indeed, it has been taken for granted for nearly two centuries.[1] In reaching this conclusion we do well to bear in mind that the focus must not be simply on the matter of judg-

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[41] The dissenting opinions argue that our decision places the President "above the law." This contention is rhetorically chilling but wholly unjustified. The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office. This case involves only a damages remedy. Although the President is not liable in civil damages for official misbehavior, that does not lift him "above" the law. The dissents do not suggest that a judge is "above" the law when he enters a judgment for which he cannot be held answerable in civil damages; or a prosecutor is above the law when he files an indictment; or a Congressman is above the law when he engages in legislative speech or debate. It is simply error to characterize an official as "above the law" because a particular remedy is not available against him.

[1] Presidential immunity for official acts while in office has never been seriously questioned until very recently. *Ante*, at 750–752, n. 31. I can find only one instance in which, prior to our decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), a citizen sued a former President for acts committed while in office. A suit against Thomas Jefferson was dismissed for being improperly brought in Virginia, thus precluding the necessity of reaching any immunity issue. *Livingston* v. *Jefferson*, 15 F. Cas. 660 (No. 8,411) (CC Va. 1811).

ing individual conduct in a fact-bound setting; rather, in those familiar terms of John Marshall, it is a *Constitution* we are expounding. Constitutional adjudication often bears unpalatable fruit. But the needs of a system of government sometimes must outweigh the right of individuals to collect damages.

It strains the meaning of the words used to say this places a President "above the law." *United States* v. *Nixon*, 418 U. S. 683 (1974). The dissents are wide of the mark to the extent that they imply that the Court today recognizes sweeping immunity for a President for all acts. The Court does no such thing. The immunity is limited to civil damages claims. Moreover, a President, like Members of Congress, judges, prosecutors, or congressional aides—all having absolute immunity—are not immune for acts outside official duties.[2] *Ante*, at 753–755. Even the broad immunity of the Speech and Debate Clause has its limits.[3]

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[2] In their "parade of horribles" and lamentations, the dissents also wholly fail to acknowledge why the same perils they fear are not present in the absolute immunity the law has long recognized for numerous other officials. At least 75,000 public officers have absolute immunity from civil damages suits for acts within the scope of their official functions. The dissenting opinions manifest an astonishing blind side in pointing to that old reliable that "no man is above the law." The Court has had no difficulty expanding the absolute immunity of Members of Congress, and in granting derivative absolute immunity to numerous aides of Members. *Gravel* v. *United States*, 408 U. S. 606 (1972).

We have since recognized absolute immunity for judges, *Stump* v. *Sparkman*, 435 U. S. 349 (1978), and for prosecutors, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), yet the Constitution provides no hint that either judges, prosecutors, or congressional aides should be so protected. Absolute immunity for judges and prosecutors is seen to derive from the common law and public policy, which recognize the need to protect judges and prosecutors from harassment. The potential danger to the citizenry from the malice of thousands of prosecutors and judges is at once more pervasive and less open to constant, public scrutiny than the actions of a President.

[3] In *United States* v. *Brewster*, 408 U. S. 501 (1972), we held that the Speech and Debate Clause does not prohibit prosecution of a Senator for accepting a bribe designed to influence his legislative acts.

In his dissenting opinion, JUSTICE WHITE confuses "judicial process" in the subpoena sense with a civil damages suit. *Post*, at 778, n. 23. He quotes language from *United States* v. *Nixon*, *supra*, at 706, as though that language has some relevance to the matter of immunity from civil damages:

> "[N]either the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified Presidential privilege of immunity from *judicial process* under all circumstances." *Post*, at 782. (Emphasis added.)

First, it is important to remember that the context of that language is a *criminal* prosecution. Second, the "judicial process" referred to was, as in *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, C. J., sitting at trial as Circuit Justice), a *subpoena* to the President to produce relevant evidence in a criminal prosecution. No issue of damages immunity was involved either in *Burr* or *United States* v. *Nixon*. In short, the quoted language has no bearing whatever on a *civil* action for damages. It is one thing to say that a President must produce evidence relevant to a criminal case, as in *Burr* and *United States* v. *Nixon*, and quite another to say a President can be held for civil damages for dismissing a federal employee. If the dismissal is wrongful the employee can be reinstated with backpay, as was done here. See n. 5, *infra*.

The immunity of a President from civil suits is not simply a doctrine derived from this Court's interpretation of common law or public policy. Absolute immunity for a President for acts within the official duties of the Chief Executive is either to be found in the constitutional separation of powers or it does not exist. The Court today holds that the Constitution mandates such immunity and I agree.

The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of

government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches. *United States* v. *Nixon*, *supra*; *Gravel* v. *United States*, 408 U. S. 606, 617 (1972). Even prior to the adoption of our Constitution, as well as after, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances. *Den on the Dem. of Bayard & Wife* v. *Singleton*, 3 N. C. 42 (1787); *Cases of the Judges of the Court of Appeals*, 8 Va. 135 (1788). Cf. *Marbury* v. *Madison*, 1 Cranch 137 (1803). However, the Judiciary always must be hesitant to probe into the elements of Presidential decisionmaking, just as other branches should be hesitant to probe into judicial decisionmaking. Such judicial intervention is not to be tolerated absent imperative constitutional necessity. *United States* v. *Nixon*, *supra*, at 709–716.[4] The Court's opinion correctly observes that judicial intrusion through private damages actions improperly impinges on and hence interferes with the independence that is imperative to the functioning of the office of a President.

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[4] JUSTICE WHITE suggests that prior to today, Presidents, prosecutors, judges, congressional aides, and other officials "could have been *held liable* for the kind of claim put forward by Fitzgerald—a personnel decision allegedly made for unlawful reasons." *Post*, at 767, n. 2 (emphasis added). But the law does not permit a plaintiff to recite "magic" words in pleadings and have the incantation operate to make these immunities vanish. JUSTICE WHITE errs fundamentally in treating all of the above officials as if the scope of their authority were identical. The authority of a President as head of the Executive Branch of our Government—a wholly unique office—is far broader than that of any other official. As the Court notes, a President has authority in the course of personnel changes in an executive department to make personnel decisions. If the decision is wrong, statutory remedies are provided. See n. 5, *infra*. This is not to say that, in a given case, it would not be appropriate to raise the question *whether* an official—even a President—had acted within the scope of the official's constitutional and statutory duties. The doctrine of absolute immunity does not extend beyond such actions.

Exposing a President to civil damages actions for official acts within the scope of the Executive authority would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment. The enormous range and impact of Presidential decisions—far beyond that of any one Member of Congress—inescapably means that many persons will consider themselves aggrieved by such acts. Absent absolute immunity, every person who feels aggrieved would be free to bring a suit for damages, and each suit—especially those that proceed on the merits—would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur if civil damages actions were made available to private individuals. Although the individual who claims wrongful conduct may indeed have sustained some injury, the need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims. We have decided that in a similar sense Members of both Houses of Congress—and their aides—must be totally free from judicial scrutiny for legislative acts; the public interest, in other words, outweighs the need for private redress of one claiming injury from legislative acts of a Member or aide of a Member.[5] The Court's concern (and the even more emphatic con-

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[5] *Gravel* v. *United States*, 408 U. S. 606 (1972). The Federal Tort Claims Act of 1946 reflects this policy distinction; in it Congress waived sovereign immunity for certain damages claims, but pointedly excepted any "discretionary function or duty . . . whether or not the discretion involved be abused." 28 U. S. C. § 2680(a). Under the Act, damage resulting from *discretionary* governmental action is not subject to compensation. See, *e. g.*, *Dalehite* v. *United States*, 346 U. S. 15 (1953). For uncompensated injuries Congress may in its discretion provide separate nonjudicial remedies such as private bills.

In this case Fitzgerald received substantial relief through the route provided by Congress: the Civil Service Commission ordered him reinstated with backpay. App. 87a–88a. Similarly situated persons are therefore

cerns expressed by JUSTICE WHITE's dissent) over "unremedied wrongs" to citizens by a President seem odd when one compares the potential for "wrongs" which thousands of congressional aides, prosecutors, and judges can theoretically inflict—with absolute immunity—on the same citizens for whom this concern is expressed. See n. 2, *supra*.

Judicial intervention would also inevitably inhibit the processes of Executive Branch decisionmaking and impede the functioning of the Office of the President. The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today—even a lawsuit ultimately found to be frivolous—often requires significant expenditures of time and money, as many former public officials have learned to their sorrow. This very case graphically illustrates the point. When litigation processes are not tightly controlled—and often they are not—they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage.[6]

I fully agree that the constitutional concept of separation of independent coequal powers dictates that a President be immune from civil damages actions based on acts within the scope of Executive authority while in office.[7] Far from plac-

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not without an adequate remedy. But see *post*, at 797 (WHITE, J., dissenting). In addition, respondent Fitzgerald has also received a settlement of $142,000. It can hardly be said he has had no remedy.

[6]Judge Learned Hand described his feelings:

"After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." 3 Lectures on Legal Topics, Association of the Bar of the City of New York 105 (1926).

[7]The Court suggests that "we need not address directly" whether Congress could create a damages action against a President. *Ante*, at 748, n. 27. However, the Court's holding, in my view, effectively resolves that issue; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result. Nothing in the Court's opinion is to be read as suggesting that a constitu-

ing a President above the law, the Court's holding places a President on essentially the same footing with judges and other officials whose absolute immunity we have recognized.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The four dissenting Members of the Court in *Butz* v. *Economou*, 438 U. S. 478 (1978), argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

The Court now applies the dissenting view in *Butz* to the Office of the President: A President, acting within the outer boundaries of what Presidents normally do, may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald fired by means of a trumped-up reduction in force, knowing that such a discharge was contrary to the civil service laws, he would be absolutely immune from suit. By the same token, if a President, without following the statutory procedures which he knows apply to himself as well as to other fed-

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tional holding of this Court can be legislatively overruled or modified. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

eral officials, orders his subordinates to wiretap or break into a home for the purpose of installing a listening device, and the officers comply with his request, the President would be absolutely immune from suit. He would be immune regardless of the damage he inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose.[1]

The Court intimates that its decision is grounded in the Constitution. If that is the case, Congress cannot provide a remedy against Presidential misconduct and the criminal laws of the United States are wholly inapplicable to the President. I find this approach completely unacceptable. I do not agree that if the Office of President is to operate effectively, the holder of that Office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law.

We have not taken such a scatter-gun approach in other cases. *Butz* held that absolute immunity did not attach to the office held by a member of the President's Cabinet but only to those specific functions performed by that officer for which absolute immunity is clearly essential. Members of Congress are absolutely immune under the Speech or Debate Clause of the Constitution, but the immunity extends only to their legislative acts. We have never held that in order for legislative work to be done, it is necessary to immunize all of the tasks that legislators must perform. Constitutional immunity does not extend to those many things that Senators and Representatives regularly and necessarily do that are not legislative acts. Members of Congress, for example, repeatedly importune the executive branch and administrative agencies outside hearing rooms and legislative halls, but they are not immune if in connection with such activity they de-

[1] This, of course, is not simply a hypothetical example. See *Halperin* v. *Kissinger*, 196 U. S. App. D. C. 285, 606 F. 2d 1192 (1979), aff'd by an equally divided Court, 452 U. S. 713 (1981).

liberately violate the law. *United States* v. *Brewster*, 408 U. S. 501 (1972), for example, makes this clear. Neither is a Member of Congress or his aide immune from damages suits if in order to secure information deemed relevant to a legislative investigation, he breaks into a house and carries away records. *Gravel* v. *United States*, 408 U. S. 606 (1972). Judges are absolutely immune from liability for damages, but only when performing a judicial function, and even then they are subject to criminal liability. See *Dennis* v. *Sparks*, 449 U. S. 24, 31 (1980); *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974). The absolute immunity of prosecutors is likewise limited to the prosecutorial function. A prosecutor who directs that an investigation be carried out in a way that is patently illegal is not immune.

In *Marbury* v. *Madison*, 1 Cranch 137, 165 (1803), the Court, speaking through The Chief Justice, observed that while there were "important political powers" committed to the President for the performance of which neither he nor his appointees were accountable in court, "the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act." The Court nevertheless refuses to follow this course with respect to the President. It makes no effort to distinguish categories of Presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure federal employees or any other person within or without the Government.

Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the Government itself and against Government offi-

cials, but only when the suit against the latter actually seeks relief against the sovereign. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 687 (1949). Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. *Id.*, at 698. Now, however, the Court clothes the Office of the President with sovereign immunity, placing it beyond the law.[2]

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[2] It is ironic that this decision should come out at the time of the tenth anniversary of the Watergate affair. Even the popular press has drawn from that affair an insight into the character of the American constitutional system that is bound to be profoundly shaken by today's decision: "The important lesson that Watergate established is that no President is above the law. It is a banality, a cliche, but it is a point on which many Americans . . . seem confused." 119 Time, No. 24, p. 28 (June 14, 1982). A majority of the Court shares this confusion.

The majority vigorously protests this characterization of its position, *ante*, at 758, n. 41, arguing that the President remains subject to law in the form of impeachment proceedings. But the abandonment of the rule of law here is not in the result reached, but in the manner of reaching it. The majority fails to apply to the President those principles which we have consistently used to determine the scope and credibility of an absolute immunity defense. It does this because of some preconceived notion of the inapplicability of general rules of law to the President.

Similarly, THE CHIEF JUSTICE, like the majority, misses the point in his wholly unconvincing contentions that the Court today does no more than extend to the President the same sort of immunity that we have recognized with respect to Members of Congress, judges, prosecutors, and legislative aides. In none of our previous cases have we extended absolute immunity to all actions "within the scope of the official's constitutional and statutory duties." Concurring opinion of THE CHIEF JUSTICE, *ante*, at 761, n. 4. Indeed, under the immunity doctrine as it existed prior to today's decision, each of these officials could have been held liable for the kind of claim put forward by Fitzgerald—a personnel decision allegedly made for unlawful reasons. Although such a decision falls within the scope of an official's duties, it does not fall within the judicial, legislative, or prosecutorial functions to which absolute immunity attaches. THE CHIEF JUSTICE's failure to grasp the difference between the functional approach to absolute immunity that we have previously adopted and the nature of today's decision accounts for his misunderstanding of this dissent.

In *Marbury* v. *Madison*, *supra*, at 163, The Chief Justice, speaking for the Court, observed: "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Until now, the Court has consistently adhered to this proposition. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), a unanimous Court held that the Governor of a State was entitled only to a qualified immunity. We reached this position, even though we recognized that

> "[i]n the case of higher officers of the executive branch . . . the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. . . . In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." *Id.*, at 246–247.

As JUSTICE BRENNAN observed in *McGautha* v. *California*, 402 U. S. 183, 252–253 (1971) (dissenting opinion): "The principle that our Government shall be of laws and not of men is so strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the Constitution" (footnote omitted). And as THE CHIEF JUSTICE said in *Complete Auto Transit, Inc.* v. *Reis*, 451 U. S. 401, 429 (1981) (dissenting opinion):

> "Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from 'The King can do no wrong.' This

> principle of individual accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice."

Unfortunately, the Court now abandons basic principles that have been powerful guides to decision. It is particularly unfortunate since the judgment in this case has few, if any, indicia of a judicial decision; it is almost wholly a policy choice, a choice that is without substantial support and that in all events is ambiguous in its reach and import.

We have previously stated that "the law of privilege as a defense to damages actions against officers of Government has 'in large part been of judicial making.'" *Butz* v. *Economou*, 438 U. S., at 501–502, quoting *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959). But this does not mean that the Court has simply "enacted" its own view of the best public policy. No doubt judicial convictions about public policy—whether and what kind of immunity is necessary or wise—have played a part, but the courts have been guided and constrained by common-law tradition, the relevant statutory background, and our constitutional structure and history. Our cases dealing with the immunity of Members of Congress are constructions of the Speech or Debate Clause and are guided by the history of such privileges at common law. The decisions dealing with the immunity of state officers involve the question of whether and to what extent Congress intended to abolish the common-law privileges by providing a remedy in the predecessor of 42 U. S. C. § 1983 for constitutional violations by state officials. Our decisions respecting immunity for federal officials—including absolute immunity for judges, prosecutors, and those officials doing similar work—also in large part reflect common-law views, as well as judicial conclusions as to what privileges are necessary if particular functions are to be performed in the public interest.

Unfortunately, there is little of this approach in the Court's decision today. The Court casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. *Ante*, at 755–756. Indeed, the majority turns this rule on its head by declaring that because the functions of the President's office are so varied and diverse and some of them so profoundly important, the office is unique and must be clothed with officewide, absolute immunity. This is policy, not law, and in my view, very poor policy.

I

In declaring the President to be absolutely immune from suit for any deliberate and knowing violation of the Constitution or of a federal statute, the Court asserts that the immunity is "rooted in the constitutional tradition of the separation of powers and supported by our history."[3] *Ante*, at 749. The decision thus has all the earmarks of a constitutional pronouncement—absolute immunity for the President's office is mandated by the Constitution. Although the Court appears to disclaim this, *ante*, at 748–749, n. 27, it is difficult to read the opinion coherently as standing for any narrower proposition: Attempts to subject the President to liability either by Congress through a statutory action or by the courts through a *Bivens* (*Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)) proceeding would violate the separation of powers.[4] Such a generalized absolute immunity cannot be sustained when examined in the traditional manner and in light of the traditional judicial sources.

The petitioner and the United States, as *amicus*,[5] rely principally on two arguments to support the claim of absolute

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[3] Although the majority opinion initially claims that its conclusion is based substantially on "our history," historical analysis in fact plays virtually no part in the analysis that follows.

[4] On this point, I am in agreement with the concurring opinion of THE CHIEF JUSTICE.

[5] The Solicitor General relies entirely upon the brief filed by his office for petitioners in *Kissinger* v. *Halperin*, 452 U. S. 713 (1981).

immunity for the President from civil liability: absolute immunity is an "incidental power" of the Presidency, historically recognized as implicit in the Constitution, and absolute immunity is required by the separation-of-powers doctrine. I will address each of these contentions.

A

The Speech or Debate Clause, Art. I, § 6, guarantees absolute immunity to Members of Congress; nowhere, however, does the Constitution directly address the issue of Presidential immunity.[6] Petitioner nevertheless argues that the debates at the Constitutional Convention and the early history of constitutional interpretation demonstrate an implicit assumption of absolute Presidential immunity. In support of this position, petitioner relies primarily on three separate items: First, preratification remarks made during the discussion of Presidential impeachment at the Convention and in The Federalist; second, remarks made during the meeting of the first Senate; and third, the views of Justice Story.

The debate at the Convention on whether or not the President should be impeachable did touch on the potential dangers of subjecting the President to the control of another branch, the Legislature.[7] Gouverneur Morris, for example, complained of the potential for dependency and argued that "[the President] can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence."[8] Colonel Mason

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[6] In fact, insofar as the Constitution addresses the issue of Presidential liability, its approach is very different from that taken in the Speech or Debate Clause. The possibility of impeachment assures that the President can be held accountable to the other branches of Government for his actions; the Constitution further states that impeachment does not bar criminal prosecution.

[7] The debate is recorded in 2 M. Farrand, Records of the Federal Convention of 1787, pp. 64–69 (1911) (hereinafter Farrand).

[8] *Id.*, at 64.

responded to this by asking if "any man [shall] be above Justice" and argued that this was least appropriate for the man "who can commit the most extensive injustice."[9] Madison agreed that "it [is] indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate."[10] Pinckney responded on the other side, believing that if granted the power, the Legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence."[11]

Petitioner concludes from this that the delegates meant impeachment to be the exclusive means of holding the President personally responsible for his misdeeds, outside of electoral politics. This conclusion, however, is hardly supported by the debate. Although some of the delegates expressed concern over limiting Presidential independence, the delegates voted 8 to 2 in favor of impeachment. Whatever the fear of subjecting the President to the power of another branch, it was not sufficient, or at least not sufficiently shared, to insulate the President from political liability in the impeachment process.

Moreover, the Convention debate did not focus on wrongs the President might commit against individuals, but rather on whether there should be a method of holding him accountable for what might be termed wrongs against the state.[12] Thus, examples of the abuses that concerned delegates were betrayal, oppression, and bribery; the delegates feared that the alternative to an impeachment mechanism would be "tumults & insurrections" by the people in response to such

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[9] *Id.*, at 65.

[10] *Ibid.*

[11] *Id.*, at 66.

[12] In The Federalist No. 65, p. 439 (J. Cooke ed. 1961), Alexander Hamilton described impeachable offenses as follows: "They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."

abuses. 2 Farrand 67. The only conclusions that can be drawn from this debate are that the independence of the Executive was not understood to require a total lack of accountability to the other branches and that there was no general desire to insulate the President from the consequences of his improper acts.[13]

Much the same can be said in response to petitioner's reliance on The Federalist No. 77. In that essay, Hamilton asked whether the Presidency combines "the requisites to safety in the republican sense—a due dependence on the people—a due responsibility." The Federalist No. 77, p. 520 (J. Cooke ed. 1961). He answered that the constitutional plan met this test because it subjected the President to both the electoral process and the possibility of impeachment, including subsequent criminal prosecution. Petitioner concludes from this that these were intended to be the exclusive means of restraining Presidential abuses. This, by no means follows. Hamilton was concerned in The Federalist No. 77, as were the delegates at the Convention, with the larger political abuses—"wrongs against the state"—that a President might commit. He did not consider what legal means might be available for redress of individualized grievances.[14]

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[13] The majority's use of the historical record is in line with its other arguments: It puts the burden on respondent to demonstrate no Presidential immunity, rather than on petitioner to prove the appropriateness of this defense. Thus, while noting that the doubts of some of the Framers were not sufficient to prevent the adoption of the Impeachment Clause, the majority nevertheless states that "nothing in [the] debates suggests an expectation that the President would be subjected to [civil damages actions]." *Ante*, at 751, n. 31. Of course, nothing in the debates suggests an expectation that the President would not be liable in civil suits for damages either. Nevertheless, the debates are one element that the majority cites to support its conclusion that "[t]he best historical evidence clearly supports the Presidential immunity we have upheld." *Ante*, at 752, n. 31.

[14] Other commentary on the proposed Constitution did, however, consider the subject of Presidential immunity. In fact, the subject was discussed in the first major defense of the Constitution published in the United States. In his essays on the Constitution, published in the Inde-

That omission should not be taken to imply exclusion in these circumstances is well illustrated by comparing some of the remarks made in the state ratifying conventions with Hamilton's discussion in No. 77. In the North Carolina ratifying convention, for example, there was a discussion of the adequacy of the impeachment mechanism for holding executive officers accountable for their misdeeds. Governor Johnson defended the constitutional plan by distinguishing three legal mechanisms of accountability:

> "If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a *public office*. It is a mode of trial pointed out for great misdemeanors against the public." [15]

Governor Johnson surely did not contemplate that the availability of an impeachment mechanism necessarily implied the exclusion of other forms of legal accountability; rather, the method of accountability was to be a function of the character of the wrong. Mr. Maclaine, another delegate to the North Carolina Convention, clearly believed that the courts would remain open to individual citizens seeking redress from injuries caused by Presidential acts:

> "The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong instructions to his

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pendent Gazetteer in September 1787, Tench Coxe included the following statement in his description of the limited power of the proposed Office of the President: "*His person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law.*" Quoted in 2 The Documentary History of the Ratification of the Constitution 141 (1976) (emphasis in original).

[15] 4 J. Elliot, Debates on the Federal Constitution 48 (1876 ed.).

> deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law."[16]

A similar distinction between different possible forms of Presidential accountability was drawn by Mr. Wilson at the Pennsylvania ratifying convention:

> "[The President] is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*."[17]

There is no more reason to respect the views of Hamilton than those of Wilson: both were members of the Constitutional Convention; both were instrumental in securing the ratification of the Constitution. But more importantly, there is simply no express contradiction in their statements. Petitioner relies on an inference drawn from silence to create this contradiction. The surrounding history simply does not support this inference.

The second piece of historical evidence cited by petitioner is an exchange at the first meeting of the Senate, involving Vice President Adams and Senators Ellsworth and Maclay. The debate started over whether or not the words "the President" should be included at the beginning of federal writs, similar to the manner in which English writs ran in the King's name. Senator Maclay thought that this would improperly combine the executive and judicial branches. This, in turn, led to a discussion of the proper relation between the two. Senator Ellsworth and Vice President Adams defended the proposition that

> "the President, personally, was not subject to any process whatever; could have no action, whatever, brought

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[16] *Id.*, at 47.

[17] 2 *id.*, at 480.

> against him; was above the power of all judges, justices, &c. For [that] would . . . put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government."[18]

In their view the impeachment process was the exclusive form of process available against the President. Senator Maclay ardently opposed this view and put the case of a President committing "murder in the street." In his view, in such a case neither impeachment nor resurrection were the exclusive means of holding the President to the law; rather, there was "loyal justice." Senator Maclay, who recorded the exchange, concludes his notes with the remark that none of this "is worth minuting, but it shows clearly how amazingly fond of the old leaven many people are."[19] In his view, Senator Ellsworth and his supporters had not fully comprehended the difference in the political position of the American President and that of the British Monarch. Again, nothing more can be concluded from this than that the proper scope of Presidential accountability, including the question whether the President should be subject to judicial process, was no clearer then than it is now.

The final item cited by petitioner clearly supports his position, but is of such late date that it contributes little to understanding the original intent. In his Commentaries on the Constitution, published in 1833, Justice Story described the "incidental powers" of the President:

> "Among these must necessarily be included the power to perform [his functions] without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases

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[18] W. Maclay, Sketches of Debate in the First Senate of the United States in 1789–1791, p. 152 (1969 reprint).

[19] *Ibid.*

> at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and he is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive."[20]

While Justice Story may have been firmly committed to this view in 1833, Senator Pinckney, a delegate to the Convention, was as firmly committed to the opposite view in 1800.[21]

Senator Pinckney, arguing on the floor of the Senate, contrasted the privileges extended to Members of Congress by the Constitution with the lack of any such privileges extended to the President.[22] He argued that this was a deliberate choice of the delegates to the Convention, who "well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here." 10 Annals of

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[20] 2 J. Story, Commentaries on the Constitution of the United States § 1569, p. 372 (4th ed. 1873).

[21] It is not possible to determine whether this is the same Pinckney that Madison recorded as Pinkney, who objected at the Convention to granting a power of impeachment to the Legislature. Two Charles Pinckneys attended the Convention. Both were from South Carolina. See 3 Farrand 559.

[22] Senator Pinckney's comments are recorded at 10 Annals of Cong. 69–83 (1800). Petitioner contends that these remarks are not relevant because they concerned only the authority of Congress to inquire into the origin of an allegedly libelous newspaper article. Reply Brief for Petitioner 7. Although this was the occasion for the remarks, Pinckney did discuss the immunity of Members of Congress as a privilege embodied in the Speech or Debate Clause: "[O]ur Constitution supposes no man . . . to be infallible, but considers them all as mere men, and subject to all the passions, and frailties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried, and leaves the members of the Legislature, for their proceedings, to be amenable to their constituents and to public opinion . . . ." 10 Annals of Cong. 71 (1800). This, then, was one of the privileges of Congress that he was contrasting with those extended (or not extended) to the President.

Cong. 72 (1800). Therefore, "[n]o privilege of this kind was intended for your Executive, nor any except that . . . for your Legislature." *Id.*, at 74.[28]

In previous immunity cases the Court has emphasized the importance of the immunity afforded the particular government official at common law. See *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). Clearly this sort of analysis is not possible when dealing with an office, the Presidency, that did not exist at common law. To the extent that historical inquiry is appropriate in this context, it is constitutional history, not

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[28] The majority cites one additional piece of historical evidence, a letter by President Jefferson, which it contends demonstrates that Jefferson believed that "the President was not intended to be subject to judicial process." *Ante*, at 751, n. 31.

Thomas Jefferson's views on the relation of the President to the judicial process are, however, not quite so clear as the majority suggests. Jefferson took a variety of positions on the proper relation of Executive and Judicial authority, at different points in his career. It would be surprising if President Jefferson had not argued strongly for such immunity from judicial process, particularly in a confrontation with Chief Justice Marshall. Jefferson's views on this issue before he became President would be of a good deal more significance. In this regard, it is significant that in Jefferson's second and third drafts of the Virginia Constitution, which also proposed a separation of the powers of government into three separate branches, he specifically proposed that the Executive be subject to judicial process: "[H]e shall be liable to action, tho' not to personal restraint for private duties or wrongs." 1 Papers of Thomas Jefferson 350, 360 (1950). Also significant is the fact that when Jefferson's followers tried to impeach Justice Chase in 1804–1805, one of the grounds of their attack on him was that he had refused to subpoena President Adams during the trial of Dr. Cooper for sedition. See E. Corwin, The President: Office and Powers 113 (4th ed. 1957). Finally, it is worth noting that even in the middle of the debate over Chief Justice Marshall's power to subpoena the President during the Burr trial, Jefferson looked to a legislative solution of the confrontation: "I hope however that . . . at the ensuing session of the legislature [the Chief Justice] may have means provided for giving to individuals the benefit of the testimony of the [Executive] functionaries in proper cases." 10 The Works of Thomas Jefferson 407 n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to George Hay, United States District Attorney for Virginia).

common law, that is relevant. From the history discussed above, however, all that can be concluded is that absolute immunity from civil liability for the President finds no support in constitutional text or history, or in the explanations of the earliest commentators. This is too weak a ground to support a declaration by this Court that the President is absolutely immune from civil liability, regardless of the source of liability or the injury for which redress is sought. This much the majority implicitly concedes since history and text, traditional sources of judicial argument, merit only a footnote in the Court's opinion. *Ante*, at 750–752, n. 31.

B

No bright line can be drawn between arguments for absolute immunity based on the constitutional principle of separation of powers and arguments based on what the Court refers to as "public policy." This necessarily follows from the Court's functional interpretation of the separation-of-powers doctrine:

> "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977).

See also *United States* v. *Nixon*, 418 U. S. 683, 706–707 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). Petitioner argues that public policy favors absolute immunity because absent such immunity the President's ability to execute his constitutionally mandated obligations will be impaired. The convergence of these two lines of argument is superficially apparent from the very fact that in both instances the approach of the Court has been characterized as a "functional" analysis.

The difference is only one of degree. While absolute immunity might maximize executive efficiency and therefore be

a worthwhile policy, lack of such immunity may not so disrupt the functioning of the Presidency as to violate the separation-of-powers doctrine. Insofar as liability in this case is of congressional origin, petitioner must demonstrate that subjecting the President to a private damages action will prevent him from "accomplishing [his] constitutionally assigned functions." Insofar as liability is based on a *Bivens* action, perhaps a lower standard of functional disruption is appropriate. Petitioner has surely not met the former burden; I do not believe that he has met the latter standard either.

Taken at face value, the Court's position that as a matter of constitutional law the President is absolutely immune should mean that he is immune not only from damages actions but also from suits for injunctive relief, criminal prosecutions and, indeed, from any kind of judicial process. But there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws enacted by Congress or by the States for that matter. Nor would such a claim be credible. The Constitution itself provides that impeachment shall not bar "Indictment, Trial, Judgment and Punishment, according to Law." Art. I, §3, cl. 7. Similarly, our cases indicate that immunity from damages actions carries no protection from criminal prosecution. *Supra*, at 765–766.

Neither can there be a serious claim that the separation-of-powers doctrine insulates Presidential action from judicial review or insulates the President from judicial process. No argument is made here that the President, whatever his liability for money damages, is not subject to the courts' injunctive powers. See, *e. g.*, *Youngstown Sheet & Tube Co.*, *supra*; *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935). Petitioner's attempt to draw an analogy to the Speech or Debate Clause, Brief for Petitioner 45, one purpose of which is "to prevent . . . accountability before a possibly hostile judiciary," *Gravel* v. *United States*, 408 U. S., at 617, breaks

down at just this point. While the Speech or Debate Clause guarantees that "for any Speech or Debate" Congressmen "shall not be questioned in any other Place," and, thus, assures that Congressmen, in their official capacity, shall not be the subject of the courts' injunctive powers, no such protection is afforded the Executive. Indeed, as the cases cited above indicate, it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review.[24] Regardless of the possibility of money damages against the President, then, the constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review. Indeed, in this very case, respondent Fitzgerald's dismissal was set aside by the Civil Service Commission as contrary to the applicable regulations issued pursuant to authority granted by Congress.

Nor can private damages actions be distinguished on the ground that such claims would involve the President personally in the litigation in a way not necessitated by suits seeking declaratory or injunctive relief against certain Presidential actions. The President has been held to be subject to judicial process at least since 1807. *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, C. J., sitting as Circuit Justice). *Burr* "squarely ruled that a subpoena may be directed to the President." *Nixon* v. *Sirica*, 159 U. S. App. D. C. 58, 67, 487 F. 2d 700, 709 (1973). Chief Justice Marshall flatly rejected any suggestion that all judicial process, in and of itself, constitutes an unwarranted interference in the Presidency:

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[24] The Solicitor General, in fact, argues that the possibility of judicial review of Presidential actions supports the claim of absolute immunity: Judicial review "serves to contain and correct the unauthorized exercise of the President's powers," making private damages actions unnecessary in order to achieve the same end. Brief for Petitioners in *Kissinger* v. *Halperin*, O. T. 1980, No. 79–880, p. 31. See n. 5, *supra*.

> "The guard, furnished to this high officer, to protect him from being harassed by *vexatious* and *unnecessary* subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued." 25 F. Cas., at 34 (emphasis added).

This position was recently rearticulated by the Court in *United States* v. *Nixon*, 418 U. S., at 706:

> "[N]either the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."

These two lines of cases establish, then, that neither subjecting Presidential actions to a judicial determination of their constitutionality, nor subjecting the President to judicial process violates the separation-of-powers doctrine. Similarly, neither has been held to be sufficiently intrusive to justify a judicially declared rule of immunity. With respect to intrusion by the judicial process itself on executive functions, subjecting the President to private claims for money damages involves no more than this. If there is a separation-of-powers problem here, it must be found in the nature of the *remedy* and not in the *process* involved.

We said in *Butz* v. *Economou*, 438 U. S. 478 (1978), that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.*, at 506–507. Today's decision in *Harlow* v. *Fitzgerald*, *post*, p. 800, makes clear that the President, were he subject to civil liability, could be held liable only for an action that he knew, or as an objective matter should have known, was illegal and a clear abuse of his authority and power. In such circumstances, the question that must be answered is who should bear the cost of the resulting injury—the wrongdoer or the victim.

The principle that should guide the Court in deciding this question was stated long ago by Chief Justice Marshall: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch, at 163. Much more recently, the Court considered the role of a damages remedy in the performance of the courts' traditional function of enforcing federally guaranteed rights: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 395.[25] To the extent that the Court denies an otherwise appropriate remedy, it denies the victim the right to be made whole and, therefore, denies him "the protection of the laws."[26]

That the President should have the same remedial obligations toward those whom he injures as any other federal officer is not a surprising proposition. The fairness of the remedial principle the Court has so far followed—that the wrongdoer, not the victim, should ordinarily bear the costs of the injury—has been found to be outweighed only in instances where potential liability is "thought to injure the governmental decisionmaking process." *Imbler* v. *Pachtman*, 424 U. S., at 437 (WHITE, J., concurring in judgment). The argument for immunity is that the possibility of a damages action will, or at least should, have an effect on the per-

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[25] See also Justice Harlan's discussion of the appropriateness of the damages remedy in order to redress the violation of certain constitutional rights. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 407–410 (concurring in judgment).

[26] Contrary to the suggestion of the majority, *ante*, at 754–755, n. 37, I do not suggest that there must always be a remedy in civil damages for every legal wrong or that *Marbury* v. *Madison* stands for this proposition. *Marbury* does, however, suggest the importance of the private interests at stake within the broader perspective of a political system based on the rule of law. The functional approach to immunity questions, which we have previously followed but which the majority today discards, represented an appropriate reconciliation of the conflicting interests at stake.

formance of official responsibilities. That effect should be to deter unconstitutional, or otherwise illegal, behavior. This may, however, lead officers to be more careful and "less vigorous" in the performance of their duties. Caution, of course, is not always a virtue and undue caution is to be avoided.

The possibility of liability may, in some circumstances, distract officials from the performance of their duties and influence the performance of those duties in ways adverse to the public interest. But when this "public policy" argument in favor of absolute immunity is cast in these broad terms, it applies to all officers, both state and federal: All officers should perform their responsibilities without regard to those personal interests threatened by the possibility of a lawsuit. See *Imbler, supra*, at 436 (WHITE, J., concurring in judgment).[27] Inevitably, this reduces the public policy argument to nothing more than an expression of judicial inclination as to which officers should be encouraged to perform their functions with "vigor," although with less care.[28]

The Court's response, until today, to this problem has been to apply the argument to individual functions, not offices, and to evaluate the effect of liability on governmental decisionmaking within that function, in light of the substantive ends that are to be encouraged or discouraged. In this case, therefore, the Court should examine the functions implicated by the causes of action at issue here and the effect of potential liability on the performance of those functions.

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[27] The Court has never held that the "public policy" conclusions it reaches as to the appropriateness of absolute immunity in particular instances are not subject to reversal through congressional action. Implicitly, therefore, the Court has already rejected a constitutionally based, separation-of-powers argument for immunity for federal officials.

[28] Surely the fact that officers of the court have been the primary beneficiaries of this Court's pronouncements of absolute immunity gives support to this appearance of favoritism.

II

The functional approach to the separation-of-powers doctrine and the Court's more recent immunity decisions[29] converge on the following principle: The scope of immunity is determined by function, not office. The wholesale claim that the President is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all Presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by a unanimous Court in *United States* v. *Nixon*, 418 U. S. 683 (1974). Therefore, whatever may be true of the necessity of such a broad immunity in certain areas of executive responsibility,[30] the only question that must be answered here is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages. I believe it does not.

Respondent has so far proceeded in this action on the basis of three separate causes of action: two federal statutes—5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505—and the First Amendment. At this point in the litigation, the availability of these causes of action is not before us. Assuming the correctness of the lower court's determination that the two federal statutes create a private right of action, I find the suggestion that the President is immune from those causes of action to be unconvincing. The attempt to found such immunity upon a separation-of-powers argument is particularly unconvincing.

The first of these statutes, 5 U. S. C. § 7211 (1976 ed., Supp. IV), states that "[t]he right of employees . . . to . . .

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[29] See *Supreme Court of Virginia* v. *Consumers Union of United States*, 446 U. S. 719 (1980); *Butz* v. *Economou*, 438 U. S. 478, 511 (1978).

[30] I will not speculate on the Presidential functions which may require absolute immunity, but a clear example would be instances in which the President participates in prosecutorial decisions.

furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, makes it a crime to obstruct congressional testimony. It does not take much insight to see that at least one purpose of these statutes is to assure congressional access to information in the possession of the Executive Branch, which Congress believes it requires in order to carry out its responsibilities.[31] Insofar as these statutes implicate a separation-of-powers argument, I would think it to be just the opposite of that suggested by petitioner and accepted by the majority. In enacting these statutes, Congress sought to preserve its own constitutionally mandated functions in the face of a recalcitrant Executive.[32] Thus, the separation-of-powers problem addressed by these statutes was first of all Presidential behavior that intruded upon, or burdened, Congress' performance of its own constitutional responsibilities. It is no response to this to say that such a cause of action would disrupt the President in the

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[31] See, *e. g.*, 48 Cong. Rec. 4653 (1912) ("During my first session of Congress I was desirous of learning the needs of the postal service and inquiring into the conditions of the employees. To my surprise I found that under an Executive order these civil-service employees could not give me any information") (remarks of Rep. Calder); *id.*, at 4656 ("I believe it is high time that Congress should listen to the appeals of these men and provide a way whereby they can properly present a petition to the Members of Congress for a redress of grievances without the fear of losing their official positions") (remarks of Rep. Reilly); *id.*, at 5157 ("I have always requested employees to consult with me on matters affecting their interest and believe that it is my duty to listen to all respectful appeals and complaints") (remarks of Rep. Evans). Indeed, it is for just this reason that petitioners in *Harlow* v. *Fitzgerald*, *post*, p. 800, argue that the statutes do not create a private right of action: "5 U. S. C. § 7211 and 18 U. S. C. § 1505 were designed to protect the legislative process, not to give one such as Fitzgerald a right to seek damages." Brief for Petitioners, O. T. 1981, No. 80–945, p. 26, n. 11.

[32] Indeed, the impetus for passage of what is now 5 U. S. C. § 7211 (1976 ed., Supp. IV) was the imposition of "gag rules" upon testimony of civil servants before congressional committees. See Exec. Order No. 402 (Jan. 25, 1906); Exec. Order No. 1142 (Nov. 26, 1909).

furtherance of his responsibilities. That approach ignores the separation-of-powers problem that lies behind the congressional action; it assumes that Presidential functions are to be valued over congressional functions.

The argument that Congress, by providing a damages action under these statutes (as is assumed in this case), has adopted an unconstitutional means of furthering its ends, must rest on the premise that Presidential control of executive employment decisions is a constitutionally assigned Presidential function with which Congress may not significantly interfere. This is a frivolous contention. In *United States* v. *Perkins*, 116 U. S. 483, 485 (1886), this Court held that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." Whatever the rule may be with respect to high officers, see *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), with respect to those who fill traditional bureaucratic positions, restrictions on executive authority are the rule and not the exception.[33] This case itself demonstrates the severe statutory restraints under which the President operates in this area.

Fitzgerald was a civil service employee working in the Office of the Secretary of the Air Force. Although his position was such as to fall within the "excepted" service, which would ordinarily mean that civil service rules and regulations applicable to removals would not protect him, 5 CFR §6.4 (1982), his status as a veteran entitled him to special protections. Veterans are entitled to certain civil service benefits afforded to "preference eligibles." 5 U. S. C. §2108 (1976 ed. and Supp. IV). These benefits include that set forth in 5 U. S. C. §7513(a) (1976 ed., Supp. IV): "[A]n agency may take [adverse action] against an employee only for such cause as will promote the efficiency of the serv-

[33] Thus, adverse action may generally be taken against civil servants only "for such cause as will promote the efficiency of the service." 5 U. S. C. §§ 7503, 7513, and 7543 (1976 ed., Supp. IV).

ice." Similarly, his veteran status entitled Fitzgerald to the protection of the reduction-in-force procedures established by civil service regulation. 5 U. S. C. §§ 3501, 3502 (1976 ed. and Supp. IV). It was precisely those procedures that the Chief Examiner for the Civil Service Commission found had been violated, in his 1973 recommendation that respondent be reappointed to his old position or to a job of comparable authority.

This brief review is enough to illustrate my point: Personnel decisions of the sort involved in this case are emphatically not a constitutionally assigned Presidential function that will tolerate no interference by either of the other two branches of Government. More important than this "quantitative" analysis of the degree of intrusion in Presidential decisionmaking permitted in this area, however, is the "qualitative" analysis suggested in Part I–B above.

Absolute immunity is appropriate when the threat of liability may bias the decisionmaker in ways that are adverse to the public interest. But as the various regulations and statutes protecting civil servants from arbitrary executive action illustrate, this is an area in which the public interest is demonstrably on the side of encouraging less "vigor" and more "caution" on the part of decisionmakers. That is, the very steps that Congress has taken to assure that executive employees will be able freely to testify in Congress and to assure that they will not be subject to arbitrary adverse actions indicate that those policy arguments that have elsewhere justified absolute immunity are not applicable here. Absolute immunity would be nothing more than a judicial declaration of policy that directly contradicts the policy of protecting civil servants reflected in the statutes and regulations.

If respondent could, in fact, have proceeded on his two statutory claims, the *Bivens* action would be superfluous. Respondent may not collect damages twice, and the same injuries are put forward by respondent as the basis for both the statutory and constitutional claims. As we have said before, "were Congress to create equally effective alternative

remedies, the need for damages relief [directly under the Constitution] might be obviated." *Davis* v. *Passman*, 442 U. S. 228, 248 (1979). Nevertheless, because the majority decides that the President is absolutely immune from a *Bivens* action as well, I shall express my disagreement with that conclusion.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), we held that individuals who have suffered a compensable injury through a violation of the rights guaranteed them by the Fourth Amendment may invoke the general federal-question jurisdiction of the federal courts in a suit for damages. That conclusion rested on two principles: First, "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,'" *id.*, at 397, quoting *Marbury* v. *Madison*, 1 Cranch, at 163; second, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U. S., at 395. In *Butz* v. *Economou*, 438 U. S. 478 (1978), we rejected the argument of the Federal Government that federal officers, including Cabinet officers, are absolutely immune from civil liability for such constitutional violations—a position that we recognized would substantially undercut our conclusion in *Bivens*. We held there that although the performance of certain limited functions will be protected by the shield of absolute immunity, the general rule is that federal officers, like state officers, have only a qualified immunity. Finally, in *Davis* v. *Passman*, *supra*, we held that a Congressman could be held liable for damages in a *Bivens*-type suit brought in federal court alleging a violation of individual rights guaranteed the plaintiff by the Due Process Clause. In my view, these cases have largely settled the issues raised by the *Bivens* problem here.

These cases established the following principles. First, it is not the exclusive prerogative of the Legislative Branch to create a federal cause of action for a constitutional violation. In the absence of adequate legislatively prescribed remedies, the general federal-question jurisdiction of the federal

courts permits the courts to create remedies, both legal and equitable, appropriate to the character of the injury. Second, exercise of this "judicial" function does not create a separation-of-powers problem: We have held both executive and legislative officers subject to this judicially created cause of action and in each instance we have rejected separation-of-powers arguments. Holding federal officers liable for damages for constitutional injuries no more violates separation-of-powers principles than does imposing equitable remedies under the traditional function of judicial review. Third, federal officials will generally have a "qualified immunity" from such suits; absolute immunity will be extended to certain functions only on the basis of a showing that exposure to liability is inconsistent with the proper performance of the official's duties and responsibilities. Finally, Congress retains the power to restrict exposure to liability, and the policy judgments implicit in this decision should properly be made by Congress.

The majority fails to recognize the force of what the Court has already done in this area. Under the above principles, the President could not claim that there are no circumstances under which he would be subject to a *Bivens*-type action for violating respondent's constitutional rights. Rather, he must assert that the absence of absolute immunity will substantially impair his ability to carry out particular functions that are his constitutional responsibility. For the reasons I have presented above, I do not believe that this argument can be successfully made under the circumstances of this case.

It is, of course, theoretically possible that the President should be held to be absolutely immune because each of the functions for which he has constitutional responsibility would be substantially impaired by the possibility of civil liability. I do not think this argument is valid for the simple reason that the function involved here does not have this character.

On which side of the line other Presidential functions would fall need not be decided in this case.

The majority opinion suggests a variant of this argument. It argues, not that every Presidential function has this character, but that distinguishing the particular functions involved in any given case would be "difficult." *Ante*, at 756.[34] Even if this were true, it would not necessarily follow that the President is entitled to absolute immunity: That would still depend on whether, in those unclear instances, it is likely to be the case that one of the functions implicated deserves the protection of absolute immunity. In this particular case, I see no such function.[35]

I do not believe that subjecting the President to a *Bivens* action would create separation-of-powers problems or "public policy" problems different from those involved in subjecting the President to a statutory cause of action.[36] Relying upon

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[34] The majority also seems to believe that by "function" the Court has in the past referred to "subjective purpose." See *ante*, at 756 ("an inquiry into the President's motives could not be avoided under the . . . 'functional' theory . . ."). I do not read our cases that way. In *Stump* v. *Sparkman*, 435 U. S. 349, 362 (1978), we held that the factors determining whether a judge's act was a "judicial action" entitled to absolute immunity "relate to the nature of the act itself, *i. e.*, whether it is a function normally performed by a judge, and to the expectations of the parties." Neither of these factors required any analysis of the purpose the judge may have had in carrying out the particular action. Similarly in *Butz* v. *Economou*, 438 U. S., at 512–516, when we determined that certain executive functions were entitled to absolute immunity because they shared "enough of the characteristics of the judicial process," we looked to objective qualities and not subjective purpose.

[35] The majority seems to suggest that responsibility for governmental reorganizations is one such function. *Ante*, at 756. I fail to see why this should be so.

[36] Although our conclusions differ, the majority opinion reflects a similar view as to the relationship between the two sources of the causes of action in this case: It does not believe it necessary to differentiate in its own analysis between the statutory and constitutional causes of action.

the history and text of the Constitution, as well as the analytic method of our prior cases, I conclude that these problems are not sufficient to justify absolute immunity for the President in general, nor under the circumstances of this case in particular.

III

Because of the importance of this case, it is appropriate to examine the reasoning of the majority opinion.

The opinion suffers from serious ambiguity even with respect to the most fundamental point: How broad is the immunity granted the President? The opinion suggests that its scope is limited by the fact that under none of the asserted causes of action "has Congress taken express legislative action to subject the President to civil liability for his official acts." *Ante*, at 748. We are never told, however, how or why congressional action could make a difference. It is not apparent that any of the propositions relied upon by the majority to immunize the President would not apply equally to such a statutory cause of action; nor does the majority indicate what new principles would operate to undercut those propositions.

In the end, the majority seems to overcome its initial hesitation, for it announces that "[w]e consider [absolute] immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history," *ante*, at 749. See also *ante*, at 757 ("A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive").[37] While the majority opinion recognizes that "[i]t is

[37] THE CHIEF JUSTICE leaves no doubt that he, at least, reads the majority opinion as standing for the broad proposition that the President is absolutely immune under the Constitution:

"I write separately to underscore that the Presidential immunity [as spelled out today] derives from and is mandated by the constitutional doctrine of separation of powers." Concurring opinion of THE CHIEF JUSTICE, *ante*, at 758.

settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States," it bases its conclusion, at least in part, on a suggestion that there is a special jurisprudence of the Presidency. *Ante*, at 753–754.[38]

But in *United States* v. *Nixon*, 418 U. S. 683 (1974), we upheld the power of a Federal District Court to issue a subpoena *duces tecum* against the President. In other cases we have enjoined executive officials from carrying out Presidential directives. See, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). Not until this case has there ever been a suggestion that the mere formalism of the name appearing on the complaint was more important in resolving separation-of-powers problems than the substantive character of the judicial intrusion upon executive functions.

Similarly, THE CHIEF JUSTICE dismisses the majority's claim that it has not decided the question of whether Congress could create a damages action against the President: "[T]he Court's holding . . . effectively resolves that issue; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result." *Ante*, at 763, n. 7.

[38] Contrary to the suggestion of the majority, *Mississippi* v. *Johnson*, 4 Wall. 475 (1866), carefully reserved the question of whether a court may compel the President himself to perform ministerial executive functions:

"We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues . . . whether, in any case, the President . . . may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime." *Id.*, at 498.

Similarly, *Kendall* v. *United States*, 12 Pet. 524 (1838), also cited by the majority, did not indicate that the President could never be subject to judicial process. In fact, it implied just the contrary in rejecting the argument that the mandamus sought involved an unconstitutional judicial infringement upon the Executive Branch:

"The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control." *Id.*, at 610.

The majority suggests that the separation-of-powers doctrine permits exercising jurisdiction over the President only in those instances where "judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance." *Ante*, at 754. Without explanation, the majority contends that a "merely private suit for damages" does not serve this function. *Ibid.*

The suggestion that enforcement of the rule of law—*i. e.*, subjecting the President to rules of general applicability—does not further the separation of powers, but rather is in derogation of this purpose, is bizarre. At stake in a suit of this sort, to the extent that it is based upon a statutorily created cause of action, is the ability of Congress to assert legal restraints upon the Executive and of the courts to perform their function of providing redress for legal harm. Regardless of what the Court might think of the merits of Mr. Fitzgerald's claim, the idea that pursuit of legal redress offends the doctrine of separation of powers is a frivolous contention passing as legal argument.

Similarly, the majority implies that the assertion of a constitutional cause of action—the whole point of which is to assure that an officer does not transgress the constitutional limits on his authority—may offend separation-of-powers concerns. This is surely a perverse approach to the Constitution: Whatever the arguments in favor of absolute immunity may be, it is untenable to argue that subjecting the President to constitutional restrictions will undercut his "unique" role in our system of government. It cannot be seriously argued that the President must be placed beyond the law and beyond judicial enforcement of constitutional restraints upon executive officers in order to implement the principle of separation of powers.

Focusing on the actual arguments the majority offers for its holding of absolute immunity for the President, one finds surprisingly little. As I read the relevant section of the

Court's opinion, I find just three contentions from which the majority draws this conclusion. Each of them is little more than a makeweight; together they hardly suffice to justify the wholesale disregard of our traditional approach to immunity questions.

First, the majority informs us that the President occupies a "unique position in the constitutional scheme," including responsibilities for the administration of justice, foreign affairs, and management of the Executive Branch. *Ante*, at 749–750. True as this may be, it says nothing about why a "unique" rule of immunity should apply to the President. The President's unique role may indeed encompass functions for which he is entitled to a claim of absolute immunity. It does not follow from that, however, that he is entitled to absolute immunity either in general or in this case in particular.

For some reason, the majority believes that this uniqueness of the President shifts the burden to respondent to prove that a rule of absolute immunity does not apply. The respondent has failed in this effort, the Court suggests, because the President's uniqueness makes "inapposite" any analogy to our cases dealing with other executive officers. *Ante*, at 750. Even if this were true, it would not follow that the President is entitled to absolute immunity; it would only mean that a particular argument is out of place. But the fact is that it is not true. There is nothing in the President's unique role that makes the arguments used in those other cases inappropriate.

Second, the majority contends that because the President's "visibility" makes him particularly vulnerable to suits for civil damages, *ante*, at 753, a rule of absolute immunity is required. The force of this argument is surely undercut by the majority's admission that "there is no historical record of numerous suits against the President." *Ante*, at 753, n. 33. Even granting that a *Bivens* cause of action did not become available until 1971, in the 11 years since then there have

been only a handful of suits. Many of these are frivolous and dealt with in a routine manner by the courts and the Justice Department. There is no reason to think that, in the future, the protection afforded by summary judgment procedures would not be adequate to protect the President, as they currently protect other executive officers from unfounded litigation. Indeed, given the decision today in *Harlow* v. *Fitzgerald*, *post*, p. 800, there is even more reason to believe that frivolous claims will not intrude upon the President's time. Even if judicial procedures were found not to be sufficient, Congress remains free to address this problem if and when it develops.

Finally, the Court suggests that potential liability "frequently could distract a President from his public duties." *Ante*, at 753. Unless one assumes that the President himself makes the countless high-level executive decisions required in the administration of government, this rule will not do much to insulate such decisions from the threat of liability. The logic of the proposition cannot be limited to the President; its extension, however, has been uniformly rejected by this Court. See *Butz* v. *Economou*, 438 U. S. 478 (1978); *Harlow* v. *Fitzgerald*, *post*, p. 800. Furthermore, in no instance have we previously held legal accountability in itself to be an unjustifiable cost. The availability of the courts to vindicate constitutional and statutory wrongs has been perceived and protected as one of the virtues of our system of delegated and limited powers. As I argued in Part I, our concern in fashioning absolute immunity rules has been that liability may pervert the decisionmaking process in a particular function by undercutting the values we expect to guide those decisions. Except for the empty generality that the President should have "'the maximum ability to deal fearlessly and impartially with' the duties of his office," *ante*, at 752, the majority nowhere suggests a particular, disadvantageous effect on a specific Presidential function. The caution that comes from requiring reasonable choices in areas that

may intrude on individuals' legally protected rights has never before been counted as a cost.

IV

The majority may be correct in its conclusion that "[a] rule of absolute immunity . . . will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive." *Ante*, at 757. Such a rule will, however, leave Mr. Fitzgerald without an adequate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims. The remedies in which the Court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," *Marbury* v. *Madison*, 1 Cranch, at 163, in the name of protecting the principle of separation of powers. Accordingly, I dissent.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I join JUSTICE WHITE's dissent. For me, the Court leaves unanswered his unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law. See *United States* v. *Lee*, 106 U. S. 196, 220 (1882),[1] and *Marbury* v. *Madison*, 1 Cranch 137, 163

[1] "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

(1803).[2] Until today, I had thought this principle was the foundation of our national jurisprudence. It now appears that it is not.

Nor can I understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open, *ante*, at 748, and n. 27, the possibility that the President nevertheless may be fully subject to congressionally created forms of liability. These two concepts, it seems to me, cannot coexist.

I also write separately to express my unalleviated concern about the parties' settlement agreement, the key details of which were not disclosed to the Court by counsel until the veritable "last minute," and even then, only because the Halperins' motion to intervene had directed the Court's attention to them. See *ante*, at 743–744, n. 24. The Court makes only passing mention of this agreement in Part II–B of its opinion.

For me, the case in effect was settled before argument by petitioner's payment of $142,000 to respondent. A much smaller sum of $28,000 was left riding on an outcome favorable to respondent, with nothing at all to be paid if petitioner prevailed, as indeed he now does. The parties publicly stated that the amount of any payment would depend upon subsequent proceedings in the District Court; in fact, the parties essentially had agreed that, regardless of this Court's ruling, no further proceedings of substance would occur in the District Court. Surely, had the details of this agreement been known at the time the petition for certiorari came before the Court, certiorari would have been denied. I cannot escape the feeling that this long-undisclosed agreement

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[2] "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

comes close to being a wager on the outcome of the case, with all of the implications that entails.

Havens Realty Corp. v. *Coleman*, 455 U. S. 363 (1982), most recently—and, it now appears, most conveniently—decided, affords less than comfortable support for retaining the case.[3] The pertinent question here is not whether the case is moot, but whether this is the *kind* of case or controversy over which we should exercise our power of discretionary review. Cf. *United States* v. *Johnson*, 319 U. S. 302 (1943).

Apprised of all developments, I therefore would have dismissed the writ as having been improvidently granted. The Court, it seems to me, brushes by this factor in order to resolve an issue of profound consequence that otherwise would not be here. Lacking support for such a dismissal, however, I join the dissent.

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[3] The agreement in *Havens* was not final until approved by the District Court, 455 U. S., at 370–371. In the present case, the parties made their agreement and presented it to the District Court only after the fact. Further, there was no preliminary payment in *Havens*. Each respondent there was to receive $400 if the Court denied certiorari or affirmed, and nothing if the Court reversed. Here, $142,000 changed hands regardless of the subsequent disposition of the case, with the much smaller sum of $28,000 resting on the Court's ultimate ruling. For me, this is not the kind of case or controversy contemplated by Art. III of the Constitution.

HARLOW ET AL. *v.* FITZGERALD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80–945. Argued November 30, 1981—Decided June 24, 1982

In respondent's civil damages action in Federal District Court based on his alleged unlawful discharge from employment in the Department of the Air Force, petitioners, White House aides to former President Nixon, were codefendants with him and were claimed to have participated in the same alleged conspiracy to violate respondent's constitutional and statutory rights as was involved in *Nixon* v. *Fitzgerald*, *ante*, p. 731. After extensive pretrial discovery, the District Court denied the motions of petitioners and the former President for summary judgment, holding, *inter alia*, that petitioners were not entitled to absolute immunity from suit. Independently of the former President, petitioners appealed the denial of their immunity defense, but the Court of Appeals dismissed the appeal.

Held:

1. Government officials whose special functions or constitutional status requires complete protection from suits for damages—including certain officials of the Executive Branch, such as prosecutors and similar officials, see *Butz* v. *Economou*, 438 U. S. 478, and the President, *Nixon* v. *Fitzgerald*, *ante*, p. 731—are entitled to the defense of absolute immunity. However, executive officials in general are usually entitled to only qualified or good-faith immunity. The recognition of a qualified immunity defense for high executives reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority. *Scheuer* v. *Rhodes*, 416 U. S. 232. Federal officials seeking absolute immunity from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. Pp. 806–808.

2. Public policy does not require a blanket recognition of absolute immunity for Presidential aides. Cf. *Butz*, *supra*. Pp. 808–813.

(a) The rationale of *Gravel* v. *United States*, 408 U. S. 606—which held the Speech and Debate Clause derivately applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself—does not mandate "derivative" absolute

immunity for the President's chief aides. Under the "functional" approach to immunity law, immunity protection extends no further than its justification warrants. Pp. 809–811.

(b) While absolute immunity might be justified for aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. To establish entitlement to absolute immunity, a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted. Under the record in this case, neither petitioner has made the requisite showing for absolute immunity. However, the possibility that petitioners, on remand, can satisfy the proper standards is not foreclosed. Pp. 811–813.

3. Petitioners are entitled to application of the qualified immunity standard that permits the defeat of insubstantial claims without resort to trial. Pp. 813–820.

(a) The previously recognized "subjective" aspect of qualified or "good faith" immunity—whereby such immunity is not available if the official asserting the defense "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury," *Wood* v. *Strickland*, 420 U. S. 308, 322—frequently has proved incompatible with the principle that insubstantial claims should not proceed to trial. Henceforth, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. Pp. 815–819.

(b) The case is remanded for the District Court's reconsideration of the question whether respondent's pretrial showings were insufficient to withstand petitioners' motion for summary judgment. Pp. 819–820.

Vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 820. BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., filed a separate concurring statement, *post*, p. 821. REHNQUIST, J., filed a concurring opinion, *post*, p. 822. BURGER, C. J., filed a dissenting opinion, *post*, p. 822.

Elliot L. Richardson argued the cause for petitioners. With him on the briefs was *Glenn S. Gerstell.*

John E. Nolan, Jr., argued the cause for respondent. With him on the brief were *Samuel T. Perkins* and *Arthur B. Spitzer.**

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon* v. *Fitzgerald*, *ante*, p. 731, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.[1] At the conclusion of discovery the

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**Louis Alan Clark* filed a brief for the Government Accountability Project of the Institute for Policy Studies as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Solicitor General Lee* for the United States; by *Roger J. Marzulla* and *William H. Mellor III* for the Mountain States Legal Foundation; by *John C. Armor* and *H. Richard Mayberry* for the National Taxpayers Legal Fund, Inc.; and by *Thomas J. Madden* for Senator Orrin G. Hatch et al.

[1] Harlow held this position from the beginning of the Nixon administration on January 20, 1969, through November 4, 1969. On the latter date he was designated as Counselor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counselor for

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.[2] The other evidence most supportive of Fitzgerald's claims consists of a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.[3]

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

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the period from July 1, 1973, through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

[2] The record reveals that Secretary Seamans called Harlow in May 1969 to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "[w]e [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153a, 164a–165a (deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152a. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See *id.*, at 186a.

[3] See *id.*, at 284a (transcript of a recorded conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See *id.*, at 218a–221a (transcript of recorded conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218a, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220a.

volvement in any wrongful activity.[4] He avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.[5]

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H. R. Haldeman,[6] Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.[7] Fitzgerald characterizes this memorandum as evi-

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[4] See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment in Civ. No. 74–178 (DC), p. 7 (Feb. 12, 1980).

[5] In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159a–160a. Harlow also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." *Id.*, at 284a. The President did not respond to Ziegler's comment.

[6] The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

[7] *Id.*, at 274a. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL–CIO official originally . . . . Evidently, Fitzgerald attended a recent meeting of the National Democratic Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald cites communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counseled against offering Fitzgerald another job in the administration at that time.[8]

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery have failed to turn up any evidence that he caused injury to Fitzgerald.[9]

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* (*Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)) claim under the First Amendment and his "inferred" statutory causes of action under 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505.[10] The court

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[8] *Id.*, at 99a–100a, 180a–181a. This memorandum, quoted in *Nixon* v. *Fitzgerald*, *ante*, at 735–736, was not sent to the Defense Department.

[9] See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon* v. *Fitzgerald*, *ante*, p. 731. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's second amended complaint of July 5, 1978.

[10] The first of these statutes, 5 U. S. C. § 7211 (1976 ed., Supp. IV), provides generally that "[t]he right of employees . . . to . . . furnish informa-

found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. App. to Pet. for Cert. 1a–3a.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. *Id.*, at 11a–12a. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 959 (1981).[11]

II

As we reiterated today in *Nixon* v. *Fitzgerald*, *ante*, p. 731, our decisions consistently have held that government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.

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tion to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See n. 36, *infra*.

[11] As in *Nixon* v. *Fitzgerald*, *ante*, p. 731, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

Our decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of "absolute immunity." The absolute immunity of legislators, in their legislative functions, see, *e. g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, *e. g.*, *Stump* v. *Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see *Butz* v. *Economou*, 438 U. S. 478, 508–512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513–517, and the President of the United States, see *Nixon* v. *Fitzgerald*, *ante*, p. 731.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247–248. In *Butz* v. *Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504–505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the adverse consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations—consequences found sufficient in *Spalding* v. *Vilas*, 161 U. S. 483 (1896), and *Barr* v. *Matteo*, 360 U. S. 564

(1959), to warrant extension to such officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

> "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." 438 U. S., at 507–508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Id.*, at 506. This we reaffirmed today in *Nixon* v. *Fitzgerald*, *ante*, at 747.

III

A

Petitioners argue that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides. In deciding this claim we do not write on an empty page. In *Butz* v. *Economou*, *supra*, the Secretary of Agriculture—a Cabinet official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the

President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we concluded that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U. S. C.] § 1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* that Members of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House. Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. The considerations that supported our decision in *Butz* apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel* v. *United States*, 408 U. S. 606 (1972).[12] In *Gravel* we endorsed the view that "it is literally impossible . . . for Members of Congress to per-

[12] Petitioners also claim support from other cases that have followed *Gravel* in holding that congressional employees are derivatively entitled to the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975); *Doe* v. *McMillan*, 412 U. S. 306 (1973).

form their legislative tasks without the help of aides and assistants" and that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . . ." *Id.*, at 616–617. Having done so, we held the Speech and Debate Clause derivatively applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself. *Id.*, at 621–622.

Petitioners contend that the rationale of *Gravel* mandates a similar "derivative" immunity for the chief aides of the President of the United States. Emphasizing that the President must delegate a large measure of authority to execute the duties of his office, they argue that recognition of derivative absolute immunity is made essential by all the considerations that support absolute immunity for the President himself.

Petitioners' argument is not without force. Ultimately, however, it sweeps too far. If the President's aides are derivatively immune because they are essential to the functioning of the Presidency, so should the Members of the Cabinet—Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself[13]—be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*.[14] Moreover, in general our cases have followed a "functional" approach to immunity law. We have recog-

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[13] See U. S. Const., Art. II, § 2 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .").

[14] THE CHIEF JUSTICE, *post*, at 828, argues that senior Presidential aides work "more intimately with the President on a daily basis than does a Cabinet officer," and that *Butz* therefore is not controlling. In recent years, however, such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously. In our view it is impossible to generalize about the role of "offices" in an individual President's administration without reference to the functions that particular officeholders are assigned by the President. *Butz* v. *Economou* cannot be distinguished on this basis.

nized that the judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. See *Hutchinson* v. *Proxmire*, 443 U. S. 111, 125–133 (1979). Our cases involving judges[15] and prosecutors[16] have followed a similar line. The undifferentiated extension of absolute "derivative" immunity to the President's aides therefore could not be reconciled with the "functional" approach that has characterized the immunity decisions of this Court, indeed including *Gravel* itself.[17]

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form

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[15] See, *e. g.*, *Supreme Court of Virginia* v. *Consumers Union of United States*, 446 U. S. 719, 731–737 (1980); *Stump* v. *Sparkman*, 435 U. S. 349, 362 (1978).

[16] In *Imbler* v. *Pachtman*, 424 U. S. 409, 430–431 (1976), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the Courts of Appeals generally have ruled that prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, *e. g.*, *Mancini* v. *Lester*, 630 F. 2d 990, 992 (CA3 1980); *Forsyth* v. *Kleindienst*, 599 F. 2d 1203, 1213–1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz* v. *Economou*, 438 U. S., at 515–517.

[17] Our decision today in *Nixon* v. *Fitzgerald*, *ante*, p. 731, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.

of argument accords with the analytical approach of our cases. For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.[18] But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.[19]

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. In order to establish entitlement to absolute im-

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[18] Cf. *United States* v. *Nixon*, 418 U. S. 683, 710–711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality"); *Katz* v. *United States*, 389 U. S. 347, 364 (1967) (WHITE, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States *or his chief legal officer, the Attorney General,* has considered the requirements of national security and authorized electronic surveillance as reasonable") (emphasis added).

[19] *Gravel* v. *United States*, 408 U. S. 606 (1972), points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *id.*, at 616–617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, at 507. Cf. *Gravel, supra*, at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

munity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability.[20] He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.[21]

Applying these standards to the claims advanced by petitioners Harlow and Butterfield, we cannot conclude on the record before us that either has shown that "public policy requires [for any of the functions of his office] an exemption of [absolute] scope." *Butz*, 438 U. S., at 506. Nor, assuming that petitioners did have functions for which absolute immunity would be warranted, could we now conclude that the acts charged in this lawsuit—if taken at all—would lie within the protected area. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alterna-

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[20] Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon* v. *Fitzgerald*, *ante*, at 747–748.

[21] The need for such an inquiry is implicit in *Butz* v. *Economou*, *supra*, at 508–517; see *Imbler* v. *Pachtman*, *supra*, at 430–431. Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, *e. g.*, *Hutchinson* v. *Proxmire*, 443 U. S. 111 (1979); *Doe* v. *McMillan*, 412 U. S. 306 (1973); *Gravel* v. *United States*, *supra*.

tive. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Butz* v. *Economou*, *supra*, at 506; see *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 410 ("For people in Bivens' shoes, it is damages or nothing"). It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole.[22] These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950).

In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz*, *supra*, at 507–508, as in *Scheuer*, 416 U. S., at 245–248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." 438 U. S., at 507–508; see *Hanrahan* v. *Hampton*, 446 U. S. 754, 765 (1980) (POWELL, J., concurring in part and dissenting in part).[23] Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by

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[22] See generally Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 S. Ct. Rev. 281, 324–327.

[23] The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney* v. *Brandhove*, 341 U. S. 367, 377–378 (1951). As the Court observed in *Tenney*: "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." *Id.*, at 378.

our prior cases—requires an adjustment of the "good faith" standard established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez* v. *Toledo*, 446 U. S. 635 (1980).[24] Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . . ." *Ibid.* (emphasis added).[25]

The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz*

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[24] Although *Gomez* presented the question in the context of an action under 42 U. S. C. § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

[25] In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, "in the specific context of school discipline," 420 U. S., at 322, would be stripped of claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, *e. g.*, *Procunier* v. *Navarette*, 434 U. S. 555, 562–563, 566 (1978), quoted in *Baker* v. *McCollan*, 443 U. S. 137, 139 (1979).

that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment.[26] And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.[27]

In the context of *Butz*' attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a back-

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[26] Rule 56(c) states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *E. g.*, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962).

[27] *E. g.*, *Landrum* v. *Moats*, 576 F. 2d 1320, 1329 (CA8 1978); *Duchesne* v. *Sugarman*, 566 F. 2d 817, 832–833 (CA2 1977); cf. *Hutchinson* v. *Proxmire*, 443 U. S., at 120, n. 9 (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

ground in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues.[28] Inquiries of this kind can be peculiarly disruptive of effective government.[29]

Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of

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[28] In suits against a President's closest aides, discovery of this kind frequently could implicate separation-of-powers concerns. As the Court recognized in *United States* v. *Nixon*, 418 U. S., at 708:

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

[29] As Judge Gesell observed in his concurring opinion in *Halperin* v. *Kissinger*, 196 U. S. App. D. C. 285, 307, 606 F. 2d 1192, 1214 (1979), aff'd in pertinent part by an equally divided Court, 452 U. S. 713 (1981):

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover *[sic]* is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial]. . . . The effect of this development upon the willingness of individuals to serve their country is obvious."

trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Procunier* v. *Navarette*, 434 U. S. 555, 565 (1978); *Wood* v. *Strickland*, 420 U. S., at 322.[30]

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,[31] should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.[32] If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily

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[30] This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U. S. C. § 1983. We have found previously, however, that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz* v. *Economou*, 438 U. S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

[31] This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

[32] As in *Procunier* v. *Navarette*, 434 U. S., at 565, we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.[33] But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967).[34]

C

In this case petitioners have asked us to hold that the respondent's pretrial showings were insufficient to survive their motion for summary judgment.[35] We think it appropri-

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[33] Cf. *Procunier* v. *Navarette*, *supra*, at 565, quoting *Wood* v. *Strickland*, 420 U. S., at 322 ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as being in good faith'").

[34] We emphasize that our decision applies only to suits for civil *damages* arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

[35] In *Butz*, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U. S., at 507. See Schuck, *supra* n. 22, at 324–327. We reiterate this admonition. Insub-

ate, however, to remand the case to the District Court for its reconsideration of this issue in light of this opinion.[36] The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

V

The judgment of the Court of Appeals is vacated, and the case is remanded for further action consistent with this opinion.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

I agree with the substantive standard announced by the Court today, imposing liability when a public-official defend-

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stantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. 438 U. S., at 508.

[36] Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view petitioners' argument on the statutory question as insubstantial. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 377–378 (1982) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981) (same); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 638–639 (1981) (same). Nor is the *Bivens* question. Cf. *Bush* v. *Lucas*, 647 F. 2d 573, 576 (CA5 1981) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon* v. *Fitzgerald*, *ante*, p. 731, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

ant "knew or should have known" of the constitutionally violative effect of his actions. *Ante*, at 815, 819. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. *Ante*, at 819, n. 33. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board," to all "government officials performing discretionary functions." *Ante*, at 818. I write separately only to note that given this standard, it seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that addressed in *Herbert* v. *Lando*, 441 U. S. 153 (1979), in which the Court observed that "[t]o erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their goo[d f]aith . . . ." *Id.*, at 170. Of course, as the Court has already noted, *ante*, at 818–819, summary judgment will be readily available to public-official defendants whenever the state of the law was so ambiguous at the time of the alleged violation that it could not have been "known" then, and thus liability could not ensue. In my view, summary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred. I see no reason why discovery of defendants' "knowledge" should not be deferred by the trial judge pending decision of any motion of defendants for summary judgment on grounds such as these. Cf. *Herbert* v. *Lando*, *supra*, at 180, n. 4 (POWELL, J., concurring).

JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concurring.

We join the Court's opinion but, having dissented in *Nixon*

v. *Fitzgerald*, *ante*, p. 731, we disassociate ourselves from any implication in the Court's opinion in the present case that *Nixon* v. *Fitzgerald* was correctly decided.

JUSTICE REHNQUIST, concurring.

At such time as a majority of the Court is willing to reexamine our holding in *Butz* v. *Economou*, 438 U. S. 478 (1978), I shall join in that undertaking with alacrity. But until that time comes, I agree that the Court's opinion in this case properly disposes of the issues presented, and I therefore join it.

CHIEF JUSTICE BURGER, dissenting.

The Court today decides in *Nixon* v. *Fitzgerald*, *ante*, p. 731, what has been taken for granted for 190 years, that it is implicit in the Constitution that a President of the United States has absolute immunity from civil suits arising out of official acts as Chief Executive. I agree fully that absolute immunity for official acts of the President is, like executive privilege, "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).[1]

In this case the Court decides that senior aides of the President do not have derivative immunity from the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel* v. *United States*, 408 U. S. 606 (1972). The Court reads *Butz* v. *Economou*, 438 U. S. 478 (1978), as resolving that question; I do not. *Butz* is clearly distinguishable.[2]

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[1] As I noted in *Nixon* v. *Fitzgerald*, Presidential immunity for official acts while in office has never been seriously questioned until very recently. See *ante*, at 758, n. 1 (BURGER, C. J., concurring).

[2] If indeed there is an irreconcilable conflict between *Gravel* and *Butz*,

In *Gravel* we held that it is implicit in the Constitution that aides of Members of Congress have absolute immunity for acts performed for Members in relation to their legislative function. We viewed the aides' immunity as deriving from the Speech or Debate Clause, which provides that "for any Speech or Debate *in either House*, [Senators and Representatives] shall not be questioned in any other Place." Art. I, § 6, cl. 1 (emphasis added). Read literally, the Clause would, of course, limit absolute immunity only to the Member and only to speech and debate within the Chamber. But we have read much more into this plain language. The Clause says nothing about "legislative acts" outside the Chambers, but we concluded that the Constitution grants absolute immunity for legislative acts not only "in either House" but in committees and conferences and in reports on legislative activities.

Nor does the Clause mention immunity for congressional aides. Yet, going far beyond any words found in the Constitution itself, we held that a Member's aides who implement policies and decisions of the Member are entitled to the same absolute immunity as a Member. It is hardly an overstatement to say that we thus avoided a "literalistic approach," *Gravel, supra*, at 617, and instead looked to the structure of the Constitution and the evolution of the function of the Legislative Branch. In short, we drew this immunity for legislative aides from a functional analysis of the legislative process in the context of the Constitution taken as a whole and in light of 20th-century realities. Neither Presidents nor Members of Congress can, as they once did, perform all their constitutional duties personally.[3]

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the Court has an obligation to try to harmonize its holdings—or at least tender a reasonable explanation. The Court has done neither.

[3] A Senator's allotment for staff varies significantly, but can range from as few as 17 to over 70 persons, in addition to committee staff aides who perform important legislative functions for Members. S. Doc. No. 97–19, pp. 27–106 (1981). House Members have roughly 18 to 26 assistants at any

We very properly recognized in *Gravel* that the central purpose of a Member's absolute immunity would be "diminished and frustrated" if the legislative aides were not also protected by the same broad immunity. Speaking for the Court in *Gravel*, JUSTICE WHITE agreed with the Court of Appeals that

> "it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks *without the help of aides* and assistants; that the day-to-day work of such aides *is so critical to the Members' performance* that they must be treated as the latter's *alter egos;* and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . . —will inevitably be diminished and frustrated." 408 U. S., at 616–617 (emphasis added).

I joined in that analysis and continue to agree with it, for without absolute immunity for these "elbow aides," who are indeed "alter egos," a Member could not effectively discharge all of the assigned constitutional functions of a modern legislator.

The Court has made this reality a matter of our constitutional jurisprudence. How can we conceivably hold that a President of the United States, who represents a vastly larger constituency than does any Member of Congress, should not have "alter egos" with comparable immunity? To perform the constitutional duties assigned to the Executive would be "literally impossible, in view of the complexities of the modern [Executive] process, . . . without the help of

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one time, in addition to committee staff aides. H. R. Doc. No. 97–113, pp. 28–174 (1981).

aides and assistants."[4] *Id.*, at 616. These words reflect the precise analysis of *Gravel*, and this analysis applies with at least as much force to a President. The primary layer of senior aides of a President—like a Senator's "alter egos"—are literally at a President's elbow, with offices a few feet or at most a few hundred feet from his own desk. The President, like a Member of Congress, may see those personal aides many times in one day. They are indeed the President's "arms" and "fingers" to aid in performing his constitutional duty to see "that the laws [are] faithfully executed." Like a Member of Congress, but on a vastly greater scale, the President cannot personally implement a fraction of his own policies and day-to-day decisions.[5]

For some inexplicable reason the Court declines to recognize the realities in the workings of the Office of a President, despite the Court's cogent recognition in *Gravel* concerning the realities of the workings of 20th-century Members of Congress. Absent equal protection for a President's aides, how will Presidents be free from the risks of "intimidation . . . by [Congress] and accountability before a possibly hostile

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[4] In the early years of the Republic, Members of Congress and Presidents performed their duties without staffs of aides and assistants. Washington and Jefferson spent much of their time on their plantations. Congress did not even appropriate funds for a Presidential clerk until 1857. Lincoln opened his own mail, Cleveland answered the phone at the White House, and Wilson regularly typed his own speeches. S. Wayne, The Legislative Presidency 30 (1978). Whatever may have been the situation beginning under Washington, Adams, and Jefferson, we know today that the Presidency functions with a staff that exercises a wide spectrum of authority and discretion and directly assists the President in carrying out constitutional duties.

[5] JUSTICE WHITE's dissent in *Nixon* v. *Fitzgerald* today expresses great concern that a President may "cause serious injury to any number of citizens even though he knows his conduct violates a statute . . . ." *Ante*, at 764. What the dissent wholly overlooks, however, is the plain fact that the absolute immunity does not protect a President for acts *outside* the constitutional function of a President.

judiciary?" *Gravel*, 408 U. S., at 617. Under today's holding in this case the functioning of the Presidency will inevitably be "diminished and frustrated." *Ibid.*

Precisely the same public policy considerations on which the Court now relies in *Nixon* v. *Fitzgerald*, and that we relied on only recently in *Gravel*, are fully applicable to senior Presidential aides. The Court's opinion in *Nixon* v. *Fitzgerald* correctly points out that if a President were subject to suit, awareness of personal vulnerability to suit "frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Ante*, at 753. This same negative incentive will permeate the inner workings of the Office of the President if the Chief Executive's "alter egos" are not protected derivatively from the immunity of the President. In addition, exposure to civil liability for official acts will result in constant judicial questioning, through judicial proceedings and pretrial discovery, into the inner workings of the Presidential Office beyond that necessary to maintain the traditional checks and balances of our constitutional structure.[6]

I challenge the Court and the dissenters in *Nixon* v. *Fitzgerald* who join in the instant holding to say that the effectiveness of Presidential aides will not "inevitably be diminished and frustrated," *Gravel*, *supra*, at 617, if they must weigh every act and decision in relation to the risks of future

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[6]The same remedies for checks on Presidential abuse also will check abuses by the comparatively small group of senior aides who act as "alter egos" of the President. The aides serve at the pleasure of the President and thus may be removed by the President. Congressional and public scrutiny maintain a constant and pervasive check on abuses, and such aides may be prosecuted criminally. See *Nixon*, *ante*, at 757. However, a criminal prosecution cannot be commenced absent careful consideration by a grand jury at the request of a prosecutor; the same check is not present with respect to the commencement of civil suits in which advocates are subject to no realistic accountability.

lawsuits. The *Gravel* Court took note of the burdens on congressional aides: the stress of long hours, heavy responsibilities, constant exposure to harassment of the political arena. Is the Court suggesting the stresses are less for Presidential aides? By construing the Constitution to give only qualified immunity to senior Presidential aides we give those key "alter egos" only lawsuits, winnable lawsuits perhaps, but lawsuits nonetheless, with stress and effort that will disperse and drain their energies and their purses.[7]

In this Court we witness the new filing of as many as 100 cases a week, many utterly frivolous and even bizarre. Yet the defending party in many of these cases may have spent or become liable for thousands of dollars in litigation expense. Hundreds of thousands of other cases are disposed of without reaching this Court. When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. Those potential risks inevitably will be a factor in discouraging able men and women from entering public service.

We—judges collectively—have held that the common law provides us with absolute immunity for ourselves with respect to judicial acts, however erroneous or ill-advised. See, *e. g.*, *Stump* v. *Sparkman*, 435 U. S. 349 (1978). Are the lowest ranking of 27,000 or more judges, thousands of prosecutors, and thousands of congressional aides—an aggregate

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[7] The Executive Branch may as a matter of grace supply some legal assistance. The Department of Justice has a longstanding policy of representing federal officers in civil suits involving conduct performed within the scope of their employment. In addition, the Department provides for retention of private legal counsel when necessary. See Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits, 95th Cong., 2d Sess. (Comm. Print 1978). The Congress frequently pays the expenses of defending its Members even as to acts wholly outside the legislative function.

of not less than 75,000 in all—entitled to greater protection than two senior aides of a President?

Butz v. *Economou*, 438 U. S. 478 (1978), does not dictate that senior Presidential aides be given only qualified immunity. *Butz* held only that a Cabinet officer exercising discretion was not entitled to absolute immunity; we need not abandon that holding. A senior Presidential aide works more intimately with the President on a daily basis than does a Cabinet officer, directly implementing Presidential decisions literally from hour to hour.

In his dissent today in *Nixon* v. *Fitzgerald*, JUSTICE WHITE states that the "Court now applies the dissenting view in *Butz* to the Office of the President." *Ante*, at 764. However, this suggests that a President and his Cabinet officers, who serve only "during the pleasure of the President," are on the same plane constitutionally. It wholly fails to distinguish the role of a President or his "elbow aides" from the role of Cabinet officers, who are department heads rather than "alter egos." It would be in no sense inconsistent to hold that a President's personal aides have greater immunity than Cabinet officers.

The Court's analysis in *Gravel* demonstrates that the question of derivative immunity does not and should not depend on a person's rank or position in the hierarchy, but on the *function* performed by the person and the relationship of that person to the superior. Cabinet officers clearly outrank United States Attorneys, yet qualified immunity is accorded the former and absolute immunity the latter; rank is important only to the extent that the rank determines the function to be performed. The function of senior Presidential aides, as the "alter egos" of the President, is an integral, inseparable part of the function of the President.[8] JUSTICE WHITE

[8] This Court had no trouble reconciling *Gravel* with *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881). In *Kilbourn* the Sergeant-at-Arms of the House of Representatives was held not to share the absolute immunity enjoyed by the Members of Congress who ordered that officer to act.

was clearly correct in *Gravel*, stating that Members of Congress could not "perform their legislative tasks without the help of aides and assistants; [and] that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . . ." 408 U. S., at 616–617.

By ignoring *Gravel* and engaging in a wooden application of *Butz*, the Court significantly undermines the functioning of the Office of the President. Under the Court's opinion in *Nixon* today it is clear that Presidential immunity derives from the Constitution as much as congressional immunity comes from that source. Can there rationally be one rule for congressional aides and another for Presidential aides simply because the initial absolute immunity of each derives from different aspects of the Constitution? I find it inexplicable why the Court makes no effort to demonstrate why the Chief Executive of the Nation should not be assured that senior staff aides will have the same protection as the aides of Members of the House and Senate.

RENDELL-BAKER ET AL. *v.* KOHN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80–2102. Argued April 19, 1982—Decided June 25, 1982

Respondent school is a privately operated school for maladjusted high school students. In recent years, nearly all of the students have been referred to the school by city school committees under a Massachusetts statute or by a state agency. When the students are referred to the school by the city committees, these cities pay for the students' education. The school also receives funds from a number of state and federal agencies. Public funds have recently accounted for at least 90% of the school's operating budget. To be eligible for tuition funding under the state statute, the school must comply with a variety of state regulations, but these regulations impose few specific personnel requirements. Similarly, the school's contracts with the State and the city committees generally do not cover personnel policies. Petitioners, a former vocational counselor and teachers at the school, brought separate actions in Federal District Court under 42 U. S. C. § 1983, claiming that they had been discharged by the school in violation of their First, Fifth, and Fourteenth Amendment rights. The court dismissed the counselor's action but denied a motion to dismiss the teachers' action, reaching conflicting conclusions as to whether the school had acted under color of state law so as to be subject to liability under § 1983. On appeal the cases were consolidated, and the Court of Appeals held that it was error to conclude that the school acted under color of state law, since, although regulated by the State, it was not dominated by the State, especially with respect to decisions involving discharge of personnel.

Held: Respondent school did not act under color of state law when it discharged petitioner employees, and hence petitioners have not stated a claim for relief under § 1983. Pp. 837–843.

(a) The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: Is the alleged infringement of federal rights fairly attributable to the State? Pp. 837–838.

(b) The school's receipt of public funds does not make the discharge decisions acts of the State. Cf. *Blum* v. *Yaretsky*, *post*, p. 991. The school is not fundamentally different from many private corporations whose business depends primarily on contracts with the government, and whose acts do not become acts of the government by reason of their

significant or even total engagement in performing public contracts. The decision to discharge petitioners was not compelled or even influenced by any state regulation, and the fact that the school performs a public function in educating maladjusted high school students does not make its acts state action. Moreover, since the school's fiscal relationship with the State is not any different from that of many contractors performing services for the government, there is no "symbiotic relationship" between the school and the State. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, distinguished. Pp. 839–843.

641 F. 2d 14, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 843. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 844.

Zachary R. Karol argued the cause for petitioners. With him on the briefs were *S. Elaine Renfro*, *Alan Jay Rom*, and *John Reinstein*.

Matthew H. Feinberg argued the cause for respondents and filed a brief for respondents Kohn et al. *Francis X. Bellotti*, Attorney General of Massachusetts, *pro se*, *Betty E. Waxman* and *Leah S. Crothers*, Assistant Attorneys General, and *Thomas R. Kiley*, First Assistant Attorney General, filed a brief for respondents Bellotti et al.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees.

I

A

Respondent Kohn is the director of the New Perspectives School, a nonprofit institution located on privately owned

**Carolyn Grace* filed a brief for the Massachusetts Association of 766 Approved Private Schools, Inc., as *amicus curiae* urging affirmance.

property in Brookline, Massachusetts. The school was founded as a private institution and is operated by a board of directors, none of whom are public officials or are chosen by public officials. The school specializes in dealing with students who have experienced difficulty completing public high schools; many have drug, alcohol, or behavioral problems, or other special needs. In recent years, nearly all of the students at the school have been referred to it by the Brookline or Boston School Committees, or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. The school issues high school diplomas certified by the Brookline School Committee.

When students are referred to the school by Brookline or Boston under Chapter 766 of the Massachusetts Acts of 1972, the School Committees in those cities pay for the students' education.[1] The school also receives funds from a number of other state and federal agencies. In recent years, public funds have accounted for at least 90%, and in one year 99%, of respondent school's operating budget. There were approximately 50 students at the school in those years and none paid tuition.[2]

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[1] Chapter 766, 1972 Mass. Acts, Mass. Gen. Laws Ann., ch. 71B, § 3 (West Supp. 1981), requires school committees to identify students with special needs and to develop suitable educational programs for such students. Massachusetts Gen. Laws Ann., ch. 71B, § 4 (West Supp. 1981), provides that school committees may "enter into an agreement with any public or private school, agency, or institution to provide the necessary special education" for these students. A student identified as having special needs and recommended for placement in private school may remain in public school, if his parents object to a placement in a particular private school, unless he is especially disruptive or dangerous. Parents who object to placement in a particular private school may also elect to place their child in a private school of their choice; in such cases, they must pay the tuition.

[2] *Amicus curiae* Massachusetts Association of 766 Approved Private Schools, Inc., of which the New Perspectives School is a member, informs the Court that many of its members have a student population which is more or less evenly divided between students referred and paid for by the State and students referred and paid for by their parents or guardians. Brief as *Amicus Curiae* 3.

To be eligible for tuition funding under Chapter 766, the school must comply with a variety of regulations, many of which are common to all schools. The State has issued detailed regulations concerning matters ranging from record-keeping to student-teacher ratios. Concerning personnel policies, the Chapter 766 regulations require the school to maintain written job descriptions and written statements describing personnel standards and procedures, but they impose few specific requirements.

The school is also regulated by Boston and Brookline as a result of its Chapter 766 funding. By its contract with the Boston School Committee, which refers to the school as a "contractor," the school must agree to carry out the individualized plan developed for each student referred to the school by the Committee. See n. 1, *supra*. The contract specifies that school employees are not city employees.[3]

The school also has a contract with the State Drug Rehabilitation Division. Like the contract with the Boston School Committee, that agreement refers to the school as a "contractor." It provides for reimbursement for services provided for students referred to the school by the Drug Rehabilitation Division, and includes requirements concerning the services to be provided. Except for general requirements, such as an equal employment opportunity requirement, the agreement does not cover personnel policies.

While five of the six petitioners were teachers at the school, petitioner Rendell-Baker was a vocational counselor hired under a grant from the federal Law Enforcement Assistance Administration, whose funds are distributed in Massachusetts through the State Committee on Criminal Justice. As a condition of the grant, the Committee on Criminal Justice must approve the school's initial hiring decisions. The purpose of this requirement is to insure that the school hires vocational counselors who meet the qualifications

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[3] The record does not contain details of the school's contract with the Brookline School Committee.

described in the school's grant proposal to the Committee; the Committee does not interview applicants for counselor positions.

B

Rendell-Baker was discharged by the school in January 1977, and the five other petitioners were discharged in June 1978. Rendell-Baker's discharge resulted from a dispute over the role of a student-staff council in making hiring decisions. A dispute arose when some students presented a petition to the school's board of directors in December 1976, seeking greater responsibilities for the student-staff council. Director Kohn opposed the proposal, but Rendell-Baker supported it and so advised the board. On December 13, Kohn notified the State Committee on Criminal Justice, which funded Rendell-Baker's position, that she intended to dismiss Rendell-Baker and employ someone else. Kohn notified Rendell-Baker of her dismissal in January 1977.

Rendell-Baker then advised the board of directors that she had been discharged without due process because she exercised her First Amendment rights. She demanded reinstatement or a hearing. The school agreed to apply a new policy, calling for appointment of a grievance committee, to consider her claims. Rendell-Baker also complained to the State Committee on Criminal Justice, which asked the school to provide a written explanation for her discharge. After the school complied, the Committee responded that it was satisfied with the explanation, but notified the school that it would not pay any backpay or other damages award Rendell-Baker might obtain from it as a result of her discharge. The Committee told Rendell-Baker that it had no authority to order a hearing, although it would refuse to approve the hiring of another counselor if the school disregarded its agreement to apply its new grievance procedure in her case. At this point Rendell-Baker objected to the composition of the grievance committee, and its proceedings apparently never went forward. Rendell-Baker filed this suit in July 1977

under 42 U. S. C. § 1983, alleging that she had been discharged in violation of her rights under the First, Fifth, and Fourteenth Amendments.

In the spring of 1978, students and staff voiced objections to Kohn's policies. The five petitioners other than Rendell-Baker, who were all teachers at the school, wrote a letter to the board of directors urging Kohn's dismissal. When the board affirmed its confidence in Kohn, students from the school picketed the home of the president of the board. The students were threatened with suspension; a local newspaper then ran a story about the controversy at the school. In response to the story, the five petitioners wrote a letter to the editor in which they stated that they thought the prohibition of picketing was unconstitutional. On the day the letter to the editor appeared, the five teachers told the president of the board that they were forming a union. Kohn discharged the teachers the next day. They brought suit against the school and its directors in December 1978. Like Rendell-Baker, they sought relief under § 1983, alleging that their rights under the First, Fifth, and Fourteenth Amendments had been violated.

C

On April 16, 1980, the District Court for the District of Massachusetts granted the defendant's motion for summary judgment in the suit brought by Rendell-Baker. A claim may be brought under § 1983 only if the defendant acted "under color" of state law.[4] The District Court took as its standard "'whether there is a sufficiently close nexus between the State and the challenged action of the regulated

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[4] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

entity so that the action of the latter may be fairly treated as that of the State itself,'" quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974). Noting that, although the State regulated the school in many ways, it imposed few conditions on the school's personnel policies, the District Court concluded that the nexus between the school and the State was not sufficiently close so that the action of the school in discharging Rendell-Baker could be considered action of the Commonwealth of Massachusetts.

Nine days earlier, on April 7, 1980, a different judge of the District Court for the District of Massachusetts had reached a contrary conclusion on the same question in the case brought by the other five petitioners. His opinion stressed the school's dependency on public funding and its regulation by numerous public entities. It also noted that although education was not a uniquely public function, it is primarily a public function, and that Brookline did not maintain a school to serve maladjusted adolescents with drug, alcohol, or emotional problems. The District Court, following the guidelines of *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961), concluded that the school performed a "public function," as described in *Jackson*, *supra*, at 352. Accordingly, it held that the defendants acted under color of state law and denied the motion to dismiss. However, on June 13, 1980, noting that there was substantial ground for disagreement on that holding, the District Court certified its order as immediately appealable pursuant to 28 U. S. C. § 1292(b).

D

The Court of Appeals for the First Circuit consolidated the two actions. It noted that the school's funding, regulation, and function show that it has a close relationship with the State. However, it stressed that the school is managed by a private board and that the State has relatively little involvement in personnel matters. It concluded that the school, al-

though regulated by the State, was not dominated by the State, especially with respect to decisions involving the discharge of personnel. The Court of Appeals then concluded that the District Court which certified the question in the action brought by the five teachers had erred in concluding that the defendants acted under color of state law.

The Court of Appeals separately considered Rendell-Baker's claim that she was discharged under color of state law since her position was funded directly by the Committee on Criminal Justice. The court rejected her claim, noting that the Committee had the power to insure that those hired had the qualifications described in the grant proposal, but that it did not have any other control over the school's personnel decisions. It therefore affirmed the District Court's dismissal of her action. 641 F. 2d 14 (1981).

We granted certiorari, 454 U. S. 891 (1981), and we affirm.

II

A

Petitioners do not claim that their discharges were discriminatory in violation of Title VII of the Civil Rights Act of 1964. Nor do they claim that their discharges were unfair labor practices in violation of the National Labor Relations Act. Rather, they allege that respondents violated 42 U. S. C. § 1983, see n. 4, *supra*, by discharging them because of their exercise of their First Amendment right of free speech and without the process due them under the Fourteenth Amendment. Although Title VII and the National Labor Relations Act govern action by private parties making personnel decisions, it is fundamental that the First Amendment prohibits governmental infringement on the right of free speech. Similarly, the Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities. *Civil*

Rights Cases, 109 U. S. 3, 11 (1883); *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948).[5] And § 1983, which was enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment, prohibits interference with federal rights under color of state law.

In *United States* v. *Price*, 383 U. S. 787, 794, n. 7 (1966), the Court stated:

> "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."

See also, *United States* v. *Classic*, 313 U. S. 299, 326 (1941). The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights "fairly attributable to the State?" *Lugar* v. *Edmondson Oil Co.*, *post*, at 937. The core issue presented in this case is not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school's action in discharging them can fairly be seen as state action.[6] If the action of the respondent school is not state action, our inquiry ends.

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[5] The Fourteenth Amendment provides, in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[6] The Court has concluded that the acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors. For example, in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 155–156 (1970), the issue was whether a restaurant violated § 1983 by refusing service to a white teacher who was in the company of six Negro students; the town sheriff arrested the white teacher for vagrancy as a result of her request to be served lunch in their company. The Court concluded that the restaurant acted under color of state law because it conspired with the sheriff, a state actor, in depriving the white teacher of federal rights.

Similarly, *Flagg Brothers, Inc.* v. *Brooks*, 436 U. S. 149 (1978), and *Lugar*, *post*, p. 922, illustrate the relevance of whether action was taken in

B

In *Blum* v. *Yaretsky*, *post*, p. 991, the Court analyzed the state action requirement of the Fourteenth Amendment. The Court considered whether certain nursing homes were state actors for the purpose of determining whether decisions regarding transfers of patients could be fairly attributed to

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concert with a state actor. The issue in *Flagg Brothers* was whether a warehouseman could be sued under § 1983 because it sought to execute a lien by selling goods in its possession pursuant to § 7–210 of the New York Uniform Commercial Code. While the sale was authorized by a state statute, and hence appeared to be threatened under color of state law, the Court did not reach that issue. Instead, it concluded that the warehouseman's decision to threaten to sell the goods was not "properly attributable to the State of New York," 436 U. S., at 156, since no state actor was involved. Since the respondent in *Flagg Brothers* claimed that the warehouseman violated her Fourteenth Amendment rights to due process and equal protection, and the Fourteenth Amendment is only offended by action of the state, we held that no claim for relief had been stated.

In *Lugar*, a lessee obtained an *ex parte* writ of attachment pursuant to a state statute, which was executed by a sheriff. The Court held that § 1983 applied because the involvement of the sheriff distinguished the case from *Flagg Brothers*. *Post*, at 941. The lessee thus acted under color of state law and the sheriff's involvement satisfied the state action requirement.

The limited role played by the Massachusetts Committee on Criminal Justice in the discharge of Rendell-Baker is not comparable to the role played by the public officials in *Adickes* and *Lugar*. The uncontradicted evidence presented by the school showed that the Committee had the power only initially to review the qualifications of a counselor selected by the school to insure that the counselor met the requirements described in the school's grant application. 641 F. 2d 14, 28 (1981). The Committee had no power to hire or discharge a counselor who had the qualifications specified in the school's grant application. Moreover, the Committee did not take any part in discharging Rendell-Baker; on the contrary, it attempted to use leverage to aid her. It requested an explanation for her discharge from the school and stated that it would not approve the appointment of a successor unless a grievance committee considered Rendell-Baker's case. As the Court of Appeals correctly concluded, there is no evidence that the Committee had any authority to take even those steps. *Ibid.*

the State, and hence be subjected to Fourteenth Amendment due process requirements. The challenged transfers primarily involved decisions, made by physicians and nursing home administrators, to move patients from "skilled nursing facilities" to less expensive "health-related facilities." *Post*, at 1005. Like the New Perspectives School, the nursing homes were privately owned and operated. *Post*, at 1003. Relying on *Flagg Brothers, Inc.* v. *Brooks*, 436 U. S. 149 (1978); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972); and *Adickes* v. *S. H. Kress Co.*, 398 U. S. 144 (1970), the Court held that, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Post*, at 1004. In determining that the transfer decisions were not actions of the State, the Court considered each of the factors alleged by petitioners here to make the discharge decisions of the New Perspectives School fairly attributable to the State.

First, the nursing homes, like the school, depended on the State for funds; the State subsidized the operating and capital costs of the nursing homes, and paid the medical expenses of more than 90% of the patients. *Post*, at 1011. Here the Court of Appeals concluded that the fact that virtually all of the school's income was derived from government funding was the strongest factor to support a claim of state action. 641 F. 2d, at 24. But in *Blum* v. *Yaretsky*, we held that the similar dependence of the nursing homes did not make the acts of the physicians and nursing home administrators acts of the State, and we conclude that the school's receipt of public funds does not make the discharge decisions acts of the State.

The school, like the nursing homes, is not fundamentally different from many private corporations whose business de-

pends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

The school is also analogous to the public defender found not to be a state actor in *Polk County* v. *Dodson*, 454 U. S. 312 (1981). There we concluded that, although the State paid the public defender, her relationship with her client was "identical to that existing between any other lawyer and client." *Id.*, at 318. Here the relationship between the school and its teachers and counselors is not changed because the State pays the tuition of the students.

A second factor considered in *Blum* v. *Yaretsky* was the extensive regulation of the nursing homes by the State. There the State was indirectly involved in the transfer decisions challenged in that case because a primary goal of the State in regulating nursing homes was to keep costs down by transferring patients from intensive treatment centers to less expensive facilities when possible. Both state and federal regulations encouraged the nursing homes to transfer patients to less expensive facilities when appropriate. *Post*, at 1007–1008, 1009–1010. The nursing homes were extensively regulated in many other ways as well. The Court relied on *Jackson*, where we held that state regulation, even if "extensive and detailed," 419 U. S., at 350, did not make a utility's actions state action.

Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters. The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as voca-

tional counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action. See n. 6, *supra*.

The third factor asserted to show that the school is a state actor is that it performs a "public function." However, our holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the *exclusive* prerogative of the State." *Jackson*, *supra*, at 353; quoted in *Blum* v. *Yaretsky*, *post*, at 1011 (emphasis added). There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. Indeed, the Court of Appeals noted that until recently the State had not undertaken to provide education for students who could not be served by traditional public schools. 641 F. 2d, at 26. That a private entity performs a function which serves the public does not make its acts state action.[7]

Fourth, petitioners argue that there is a "symbiotic relationship" between the school and the State similar to the relationship involved in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). Such a claim is rejected in *Blum* v. *Yaretsky*, and we reject it here. In *Burton*, the Court held that the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the sup-

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[7] There is no evidence that the State has attempted to avoid its constitutional duties by a sham arrangement which attempts to disguise provision of public services as acts of private parties. Cf. *Evans* v. *Newton*, 382 U. S. 296 (1966) (private trustees appointed to manage previously public park for white persons only).

port of the garage. 365 U. S., at 723. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions. Here the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in *Burton* exists here.

C

We hold that petitioners have not stated a claim for relief under 42 U. S. C. § 1983; accordingly, the judgment of the Court of Appeals for the First Circuit is

Affirmed.

JUSTICE WHITE, concurring in the judgments.*

The issue in *Blum* v. *Yaretsky*, No. 80–1952, is whether a private nursing home's decision to discharge or transfer a Medicaid patient satisfies the state-action requirement of the Fourteenth Amendment. To satisfy this requirement, respondents must show that the transfer or discharge is made on the basis of some rule of decision for which the State is responsible. *Lugar* v. *Edmondson Oil Co.*, *post*, at 937. It is not enough to show that the State takes certain actions in response to this private decision. The rule of decision implicated in the actions at issue here appears to be nothing more than a medical judgment. This is the clear import of the majority's conclusion that the "decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State," *post*, at 1008, with which I agree.

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*[This opinion applies also to No. 80–1952, *Blum, Commissioner of the New York State Department of Social Services, et al.* v. *Yaretsky et al.*, *post*, p. 991.]

Similarly, the allegations of the petitioners in *Rendell-Baker* v. *Kohn*, No. 80–2102, fail to satisfy the state-action requirement. In this case, the question of state action focuses on an employment decision made by a private school that receives most of its funding from public sources and is subject to state regulation in certain respects. For me, the critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State. As the majority states, "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Ante*, at 841. The employment decision remains, therefore, a private decision not fairly attributable to the State.

Accordingly, I concur in the judgments.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioners in these consolidated cases, former teachers and a counselor at the New Perspectives School in Brookline, Mass., were discharged by the school's administrators when they criticized certain school policies. They commenced actions under 42 U. S. C. § 1983, claiming that they had been discharged in violation of the First, Fifth, and Fourteenth Amendments. The Court today holds that their suits must be dismissed because the school did not act "under color" of state law. According to the majority, the decision of the school to discharge petitioners cannot fairly be regarded as a decision of the Commonwealth of Massachusetts.

In my view, this holding simply cannot be justified. The State has delegated to the New Perspectives School its statutory duty to educate children with special needs. The school receives almost all of its funds from the State, and is heavily regulated. This nexus between the school and the State is so substantial that the school's action must be considered state action. I therefore dissent.

I

The critical facts of this case deserve restatement. Chapter 766 of the Massachusetts Acts of 1972, Mass. Gen. Laws Ann., ch. 71B, §§ 1–14 (West 1981), provides that all students with special needs are entitled to a suitable publicly funded education under the supervision of the state and local governments. The school committee of every city, town, or school district in Massachusetts must identify all children who, because of physical or emotional disability, have special educational needs. It must prepare an individualized educational program tailored to meet those needs, and arrange for the implementation of that program. The school committee may offer the programs through existing public schools, or it may contract with private schools to implement the programs. If the school committee decides to place a child in a private school, it must bear all the expenses associated with the placement; parents need not pay the tuition.

If a school committee decides to place a child in a private school, it must closely monitor the child's educational progress. Every three months it must determine whether the child can be transferred to a less restrictive environment, such as a public school. 603 Code Mass. Regs. § 28, ¶¶ 502.4(i), 804.2 (1979). In general, special education programs must be provided in the least restrictive environment possible. ¶ 322.2. If the parents object to the placement of their child in private school, the child may remain in public school unless he is disruptive or dangerous. Parents may also place their child in a private school of their own choice. If they do so, however, they must pay the tuition.

As of 1978, all 50 students enrolled at the New Perspectives School were children with alcohol, drug, behavioral, or other special problems. They had been placed there pursuant to Chapter 766 by the town of Brookline, the city of Boston, or the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. None of the students pays

tuition. When they graduate, they receive a diploma certified by the Town of Brookline School Committee.

The New Perspectives School is funded almost entirely by governmental agencies. In fiscal year 1975–1976, public funds accounted for 91% of the school's budget. In fiscal year 1976–1977, public funds accounted for 99% of the budget. The school has received money from the town of Brookline, the Massachusetts Department of Mental Health, the Massachusetts Department of Youth Services, the Massachusetts Division of Family and Children's Services, the Massachusetts Office for Children, and the federal Law Enforcement Assistance Administration. See 641 F. 2d 14, 17 (CA1 1981).

In order to remain eligible for placements and funding under Chapter 766, the New Perspectives School must comply with a variety of regulations. The Massachusetts Department of Education has promulgated "Guidelines for Approval of Day Educational Component in Private Schools under Chapter 766." These guidelines cover almost every aspect of a private school's operations, including financial recordkeeping, student discipline, medical examinations for students, parent involvement, health care, subjects of instruction, teacher-student ratio, student records, confidentiality of records, transportation, insurance, nutrition, food preparation, toileting procedures, physical facilities, and classroom equipment. The guidelines also address personnel policies. They set forth minimum standards for staff training, use of volunteers, teacher qualifications, and teacher evaluations. They further require that the school maintain written job descriptions and a written policy on criteria and procedures for hiring and dismissal, and procedures for handling staff complaints. And they require that the school provide vacations and other benefits.

The New Perspectives School is subject to additional regulation under contracts with each of the governmental units that refers students. A contract with the Massachusetts De-

partment of Mental Health, Drug Rehabilitation Division, requires the school to provide counseling, educational, and vocational services for drug abusers. Under a contract with the city of Boston, the school must carry out the educational plan devised by the Boston School Committee for each Boston student placed with the school. The school must submit periodic reports to the city and is subject to inspection at any time during normal business hours. Finally, the school is bound by regulations contained in contracts with the Massachusetts Department of Youth Services and the Brookline School Committee. See 641 F. 2d, at 18.

II

The decisions of this Court clearly establish that where there is a symbiotic relationship between the State and a privately owned enterprise, so that the State and a privately owned enterprise are participants in a joint venture, the actions of the private enterprise may be attributable to the State. "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character" that it can be regarded as governmental action. *Evans* v. *Newton*, 382 U. S. 296, 299 (1966). See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); see also *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 175 (1972). The question whether such a relationship exists "can be determined only in the framework of the peculiar facts or circumstances present." *Burton*, *supra*, at 726. Here, an examination of the facts and circumstances leads inexorably to the conclusion that the actions of the New Perspectives School should be attributed to the State; it is difficult to imagine a closer relationship between a government and a private enterprise.

The New Perspectives School receives virtually all of its funds from state sources. This financial dependence on the State is an important indicium of governmental involvement.

The school's very survival depends on the State. If the State chooses, it may exercise complete control over the school's operations simply by threatening to withdraw financial support if the school takes action that it considers objectionable.

The school is heavily regulated and closely supervised by the State. This fact provides further support for the conclusion that its actions should be attributed to the State. The school's freedom of decisionmaking is substantially circumscribed by the Massachusetts Department of Education's guidelines and the various contracts with state agencies. For example, the school is required to develop and comply with written rules for hiring and dismissal of personnel. Almost every decision the school makes is substantially affected in some way by the State's regulations.[1]

The fact that the school is providing a substitute for public education is also an important indicium of state action. The provision of education is one of the most important tasks performed by government: it ranks at the very apex of the function of a State. *Ambach* v. *Norwick*, 441 U. S. 68, 77 (1979).[2] Of course, as the majority emphasizes, *ante*, at

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[1] The majority argues that the fact that the school receives almost all of its funds from the State is not enough, by itself, to justify a finding of state action. It also contends that the fact that the school is closely supervised and heavily regulated is not enough, by itself, to justify such a finding. *Ante*, at 840–842. I am in general agreement with both propositions. However, when these two factors are present in the same case, and when other indicia of state action are also present, a finding of state action may very well be justified. By analyzing the various indicia of state action separately, without considering their cumulative impact, the majority commits a fundamental error. See also *ante*, at 842–843.

[2] This Court has repeatedly recognized the unique role that education plays in American society. See *Plyler* v. *Doe*, *ante*, at 221 (public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"); *Wisconsin* v. *Yoder*, 406 U. S. 205, 221 (1972) (education is necessary to "prepare citizens to participate effectively and intelligently in our open political system"); *Abington School District* v. *Schempp*, 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring)

842, performance of a public function is by itself sufficient to justify treating a private entity as a state actor only where the function has been "traditionally the exclusive prerogative of the State." *Jackson, supra*, at 353. See *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Smith* v. *Allwright*, 321 U. S. 649 (1944). But the fact that a private entity is performing a vital public function, when coupled with other factors demonstrating a close connection with the State, may justify a finding of state action. Cf. *Evans* v. *Newton, supra*.

The school's provision of a substitute for public education deserves particular emphasis because of the role of Chapter 766. Under this statute, the State is *required* to provide a free education to all children, including those with special needs. Clearly, if the State had decided to provide the service itself, its conduct would be measured against constitutional standards. The State should not be permitted to avoid constitutional requirements simply by delegating its statutory duty to a private entity.[3] In my view, such a delegation does not convert the performance of the duty from public to private action when the duty is specific and the private institution's decisionmaking authority is significantly curtailed.

When an entity is not only heavily regulated and funded by the State, but also provides a service that the State is required to provide, there is a very close nexus with the State.

(public education is a "most vital civic institution for the preservation of a democratic system of government"); *Meyer* v. *Nebraska*, 262 U. S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance").

[3] A State may not deliberately delegate a task to a private entity in order to avoid its constitutional obligations. *Terry* v. *Adams*, 345 U. S. 461 (1953). But a State's decision to delegate a duty to a private entity should be carefully examined even when it has acted, not in bad faith, but for reasons of convenience. The doctrinal basis for the state action requirement is that exercises of state authority pose a special threat to constitutional values. A private entity vested with state authority poses that threat just as clearly as a state agency.

Under these circumstances, it is entirely appropriate to treat the entity as an arm of the State. Cf. *Smith* v. *Allwright*, *supra*; *Terry* v. *Adams*, 345 U. S. 461, 469 (1953) (opinion of Black, J.). Here, since the New Perspectives School exists solely to fulfill the State's obligations under Chapter 766, I think it fully reasonable to conclude that the school is a state actor.

Indeed, I would conclude that the actions challenged here were under color of state law, even if I believed that the sole basis for state action was the fact that the school was providing Chapter 766 services. Petitioners claim that they were discharged because they supported student demands for increased responsibilities in school affairs, that is, because they criticized the school's educational policies. If petitioners' allegations are true, then the school has adopted a specific view of the sort of education that should be provided under the statute, and refuses to tolerate departures from that view.[4] The State, by refusing to intervene, has effectively endorsed that view of its duties under Chapter 766. In short, because petitioners' criticism was directly addressed

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[4]This Court has previously emphasized the close relationship between teachers' free speech and the educational process. See *Givhan* v. *Western Line Consolidated School District*, 439 U. S. 410 (1979); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Shelton* v. *Tucker*, 364 U. S. 479 (1960).

The Commonwealth of Massachusetts has recently promulgated regulations recognizing that the role of teachers of special needs students is not limited to course instruction. These regulations provide:

"[T]he candidate will demonstrate that he or she:

1. responds to the needs of individual students so as to enhance their self-esteem and development

2. establishes constructive relationships with parents and others primarily concerned with the well-being of his or her students

3. works to develop a learning environment which is favorable to openness of inquiry and devoid of ridicule." 603 Code Mass. Regs. § 7, ¶ 7.04(40)(f) (1982).

to the State's responsibilities under Chapter 766, a finding of state action is justified.[5]

The majority repeatedly compares the school to a private contractor that "depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government." *Ante*, at 840–841. The New Perspectives School can be readily distinguished, however. Although shipbuilders and dambuilders, like the school, may be dependent on government funds, they are not so closely supervised by the government. And unlike most private contractors, the school is performing a statutory duty of the State.

The majority also focuses on the fact that the actions at issue here are personnel decisions. It would apparently concede that actions directly affecting the students could be treated as under color of state law, since the school is fulfilling the State's obligations to those children under Chapter 766. It suggests, however, that the State has no interest in personnel decisions. As I have suggested, I do not share this narrow view of the school's obligations; the personnel decisions challenged here are related to the provision of Chapter 766 education. In any event, since the school is funded almost entirely by the State, is closely supervised by the State, and exists solely to perform the State's statutory duty to educate children with special needs—since the school is really just an arm of the State—its personnel decisions may appropriately be considered state action.

III

Even though there are myriad indicia of state action in this case, the majority refuses to find that the school acted under

[5] In my view, this connection between the teacher's role and the provision of Chapter 766 education would justify a finding that the State had acted under color of state law, even if the school did not depend solely on Chapter 766 placements. If the school had only one special needs student, and petitioners were discharged for criticizing the school's education of that child, a finding of state action might be justified.

color of state law when it discharged petitioners. The decision in this case marks a return to empty formalism in state action doctrine. Because I believe that the state action requirement must be given a more sensitive and flexible interpretation than the majority offers, I dissent.

Syllabus

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, ET AL. *v.* PICO, BY HIS NEXT FRIEND PICO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80–2043. Argued March 2, 1982—Decided June 25, 1982

Petitioner Board of Education, rejecting recommendations of a committee of parents and school staff that it had appointed, ordered that certain books, which the Board characterized as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," be removed from high school and junior high school libraries. Respondent students then brought this action for declaratory and injunctive relief under 42 U. S. C. § 1983 against the Board and petitioner Board members, alleging that the Board's actions had denied respondents their rights under the First Amendment. The District Court granted summary judgment in petitioners' favor. The Court of Appeals reversed and remanded for a trial on the merits of respondents' allegations.

Held: The judgment is affirmed.

638 F. 2d 404, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL and JUSTICE STEVENS, concluded:

1. The First Amendment imposes limitations upon a local school board's exercise of its discretion to remove books from high school and junior high school libraries. Pp. 863–872.

(a) Local school boards have broad discretion in the management of school affairs, but such discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 506, and such rights may be directly and sharply implicated by the removal of books from the shelves of a school library. While students' First Amendment rights must be construed "in light of the special characteristics of the school environment," *ibid.*, the special characteristics of the school *library* make that environment especially appropriate for the recognition of such rights. Pp. 863–869.

(b) While petitioners might rightfully claim absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values in schools, petitioners' reliance upon that duty is misplaced

where they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom into the school library and the regime of voluntary inquiry that there holds sway. P. 869.

(c) Petitioners possess significant discretion to determine the content of their school libraries, but that discretion may not be exercised in a narrowly partisan or political manner. Whether petitioners' removal of books from the libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. Local school boards may not remove books from school libraries simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642. If such an intention was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. Pp. 869–872.

2. The evidentiary materials before the District Court must be construed favorably to respondents, given the procedural posture of this case. When so construed, those evidentiary materials raise a genuine issue of material fact as to whether petitioners exceeded constitutional limitations in exercising their discretion to remove the books at issue from their school libraries. Respondents' allegations, and some of the evidentiary materials before the District Court, also fail to exclude the possibility that petitioners' removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivation. Pp. 872–875.

JUSTICE BLACKMUN concluded that a proper balance between the limited constitutional restriction imposed on school officials by the First Amendment and the broad state authority to regulate education, would be struck by holding that school officials may not remove books from school libraries for the *purpose* of restricting access to the political ideas or social perspectives discussed in the books, when that action is motivated simply by the officials' disapproval of the ideas involved. Pp. 879–882.

JUSTICE WHITE, while agreeing that there should be a trial to resolve the factual issues, concluded that there is no necessity at this point for discussing the extent to which the First Amendment limits the school board's discretion to remove books from the school libraries. Pp. 883–884.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL and STEVENS, JJ., joined and in all but Part II–A(1) of which BLACKMUN, J., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 875. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 883. BURGER, C. J., filed a

dissenting opinion, in which POWELL, REHNQUIST, and O'CONNOR, JJ., joined, *post*, p. 885. POWELL, J., filed a dissenting opinion, *post*, p. 893. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 904. O'CONNOR, J., filed a dissenting opinion, *post*, p. 921.

George W. Lipp, Jr., argued the cause for petitioners. With him on the briefs was *David S. J. Rubin*.

Alan H. Levine argued the cause for respondents. With him on the brief were *Steven R. Shapiro, Burt Neuborne, Alan Azzara, Bruce J. Ennis, Jr.*, and *Charles S. Sims*.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL and JUSTICE STEVENS joined, and in which JUSTICE BLACKMUN joined except for Part II–A–(1).

The principal question presented is whether the First Amendment[1] imposes limitations upon the exercise by a local

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*Briefs of *amici curiae* urging reversal were filed by *Bruce A. Taylor* for Charles H. Keating, Jr., et al.; and by *David Crump* for the Legal Foundation of America.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll, Marsha Berzon, Laurence Gold*, and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations et al.; by *Don H. Reuben* and *James A. Klenk* for the American Library Association et al.; by *Harold P. Weinberger, Justin J. Finger*, and *Jeffrey P. Sinensky* for the Anti-Defamation League of B'Nai B'Rith; by *R. Bruce Rich* for the Association of American Publishers, Inc., et al.; by *Irwin Karp* for the Authors League of America, Inc.; by *Robert M. Weinberg, Michael H. Gottesman*, and *David Rubin* for the National Education Association; by *James R. Sandner, Jeffrey S. Karp*, and *Elizabeth A. Truly* for New York State United Teachers; and by *Jerry Simon Chasen* and *Marcia B. Paul* for P. E. N. American Center.

Briefs of *amici curiae* were filed by *Nathan Z. Dershowitz* and *Edward Labaton* for the American Jewish Congress et al.; and by *Whitney North Seymour, Jr.*, and *Martha L. Wolfe* for the Long Island Library Association Coalition.

[1]The Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." It applies to

school board of its discretion to remove library books from high school and junior high school libraries.

I

Petitioners are the Board of Education of the Island Trees Union Free School District No. 26, in New York, and Richard Ahrens, Frank Martin, Christina Fasulo, Patrick Hughes, Richard Melchers, Richard Michaels, and Louis Nessim. When this suit was brought, Ahrens was the President of the Board, Martin was the Vice President, and the remaining petitioners were Board members. The Board is a state agency charged with responsibility for the operation and administration of the public schools within the Island Trees School District, including the Island Trees High School and Island Trees Memorial Junior High School. Respondents are Steven Pico, Jacqueline Gold, Glenn Yarris, Russell Rieger, and Paul Sochinski. When this suit was brought, Pico, Gold, Yarris, and Rieger were students at the High School, and Sochinski was a student at the Junior High School.

In September 1975, petitioners Ahrens, Martin, and Hughes attended a conference sponsored by Parents of New York United (PONYU), a politically conservative organization of parents concerned about education legislation in the State of New York. At the conference these petitioners obtained lists of books described by Ahrens as "objectionable," App. 22, and by Martin as "improper fare for school students," *id.*, at 101.[2] It was later determined that the High School library contained nine of the listed books, and that another listed book was in the Junior High School library.[3] In

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the States by virtue of the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936).

[2] The District Court noted, however, that petitioners "concede that the books are not obscene." 474 F. Supp. 387, 392 (EDNY 1979).

[3] The nine books in the High School library were: Slaughter House Five, by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories of Negro Writers, edited

February 1976, at a meeting with the Superintendent of Schools and the Principals of the High School and Junior High School, the Board gave an "unofficial direction" that the listed books be removed from the library shelves and delivered to the Board's offices, so that Board members could read them.[4] When this directive was carried out, it became publicized, and the Board issued a press release justifying its action. It characterized the removed books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," and concluded that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers." 474 F. Supp. 387, 390 (EDNY 1979).

A short time later, the Board appointed a "Book Review Committee," consisting of four Island Trees parents and four members of the Island Trees schools staff, to read the listed books and to recommend to the Board whether the books should be retained, taking into account the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level." In July, the Committee

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by Langston Hughes; Go Ask Alice, of anonymous authorship; Laughing Boy, by Oliver LaFarge; Black Boy, by Richard Wright; A Hero Ain't Nothin' But A Sandwich, by Alice Childress; and Soul On Ice, by Eldridge Cleaver. The book in the Junior High School library was A Reader for Writers, edited by Jerome Archer. Still another listed book, The Fixer, by Bernard Malamud, was found to be included in the curriculum of a 12th-grade literature course. 474 F. Supp., at 389, and nn. 2–4.

[4] The Superintendent of Schools objected to the Board's informal directive, noting:

"[W]e already have a policy . . . designed expressly to handle such problems. It calls for the Superintendent, upon receiving an objection to a book or books, to appoint a committee to study them and make recommendations. I feel it is a good policy—and it is Board policy—and that it should be followed in this instance. Furthermore, I think it can be followed quietly and in such a way as to reduce, perhaps avoid, the public furor which has always attended such issues in the past." App. 44.

The Board responded to the Superintendent's objection by repeating its directive "that *all copies* of the library books in question be removed from the libraries to the Board's office." *Id.*, at 47 (emphasis in original).

made its final report to the Board, recommending that five of the listed books be retained[5] and that two others be removed from the school libraries.[6] As for the remaining four books, the Committee could not agree on two,[7] took no position on one,[8] and recommended that the last book be made available to students only with parental approval.[9] The Board substantially rejected the Committee's report later that month, deciding that only one book should be returned to the High School library without restriction,[10] that another should be made available subject to parental approval,[11] but that the remaining nine books should "be removed from elementary and secondary libraries and [from] use in the curriculum." *Id.*, at 391.[12] The Board gave no reasons for rejecting the recommendations of the Committee that it had appointed.

Respondents reacted to the Board's decision by bringing the present action under 42 U. S. C. § 1983 in the United States District Court for the Eastern District of New York. They alleged that petitioners had

> "ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, politi-

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[5] The Fixer, Laughing Boy, Black Boy, Go Ask Alice, and Best Short Stories by Negro Writers. 474 F. Supp., at 391, nn. 6–7.

[6] The Naked Ape and Down These Mean Streets. 474 F. Supp., at 391, n. 8.

[7] Soul On Ice and A Hero Ain't Nothin' But A Sandwich. 474 F. Supp., at 391, n. 9.

[8] A Reader for Writers. 474 F. Supp., at 391, n. 11. The reason given for this disposition was that all members of the Committee had not been able to read the book. *Id.*, at 391.

[9] Slaughter House Five. 474 F. Supp., at 391, n. 10.

[10] Laughing Boy. 474 F. Supp., at 391, n. 12.

[11] Black Boy. 474 F. Supp., at 391, n. 13.

[12] As a result, the nine removed books could not be assigned or suggested to students in connection with school work. *Id.*, at 391. However, teachers were not instructed to refrain from discussing the removed books or the ideas and positions expressed in them. App. 131.

> cal and moral tastes and not because the books, taken as a whole, were lacking in educational value." App. 4.

Respondents claimed that the Board's actions denied them their rights under the First Amendment. They asked the court for a declaration that the Board's actions were unconstitutional, and for preliminary and permanent injunctive relief ordering the Board to return the nine books to the school libraries and to refrain from interfering with the use of those books in the schools' curricula. *Id.*, at 5–6.

The District Court granted summary judgment in favor of petitioners. 474 F. Supp. 387 (1979). In the court's view, "the parties substantially agree[d] about the motivation behind the board's actions," *id.*, at 391—namely, that

> "the board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students." *Id.*, at 392.

With this factual premise as its background, the court rejected respondents' contention that their First Amendment rights had been infringed by the Board's actions. Noting that statutes, history, and precedent had vested local school boards with a broad discretion to formulate educational policy,[13] the court concluded that it should not intervene in "'the daily operations of school systems'" unless "'basic constitutional values'" were "'sharply implicate[d],'"[14] and deter-

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[13] 474 F. Supp., at 396–397, citing *Presidents Council, District 25* v. *Community School Board No. 25*, 457 F. 2d 289 (CA2 1972); *James* v. *Board of Education*, 461 F. 2d 566, 573 (CA2 1972); *East Hartford Educational Assn.* v. *Board of Education*, 562 F. 2d 838, 856 (CA2 1977) (en banc).

[14] 474 F. Supp., at 395, quoting *Presidents Council, District 25* v. *Community School Board No. 25*, *supra*, at 291 (in turn quoting *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968)).

mined that the conditions for such intervention did not exist in the present case. Acknowledging that the "removal [of the books] . . . clearly was content-based," the court nevertheless found no constitutional violation of the requisite magnitude:

> "The board has restricted access only to certain books which the board believed to be, in essence, vulgar. While removal of such books from a school library may . . . reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right." *Id.*, at 397.

A three-judge panel of the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court, and remanded the action for a trial on respondents' allegations. 638 F. 2d 404 (1980). Each judge on the panel filed a separate opinion. Delivering the judgment of the court, Judge Sifton treated the case as involving "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters," and concluded that petitioners were obliged to demonstrate a reasonable basis for interfering with respondents' First Amendment rights. *Id.*, at 414–415. He then determined that, at least at the summary judgment stage, petitioners had not offered sufficient justification for their action,[15] and concluded that respondents "should have . . . been offered an opportunity to persuade a finder of fact that the ostensible justifications for [petitioners'] actions . . . were simply pretexts for the suppression of free speech." *Id.*, at 417.[16] Judge New-

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[15] After criticizing "the criteria for removal" employed by petitioners as "suffer[ing] from excessive generality and overbreadth," and the procedures used by petitioners as "erratic, arbitrary and free-wheeling," Judge Sifton observed that "precision of regulation and sensitivity to First Amendment concerns" were "hardly established" by such procedures. 638 F. 2d, at 416.

[16] Judge Sifton stated that it could be inferred from the record that petitioners' "political views and personal taste [were] being asserted not in the

man concurred in the result. *Id.*, at 432–438. He viewed the case as turning on the contested factual issue of whether petitioners' removal decision was motivated by a justifiable desire to remove books containing vulgarities and sexual explicitness, or rather by an impermissible desire to suppress ideas. *Id.*, at 436–437.[17] We granted certiorari, 454 U. S. 891 (1981).

II

We emphasize at the outset the limited nature of the substantive question presented by the case before us. Our precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom. For example, *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), struck down a state law that forbade the teaching of modern foreign languages in public and private schools, and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), declared unconstitutional a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school. But the current action does not require us to re-enter this difficult terrain, which *Meyer* and *Epperson* traversed without apparent misgiving. For as this case is presented to us, it does not involve textbooks, or indeed any books that Island

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interests of the children's well-being, but rather for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community." *Id.*, at 417.

[17] Judge Mansfield dissented, *id.*, at 419–432, based upon a distinctly different reading of the record developed in the District Court. According to Judge Mansfield, "the undisputed evidence of the motivation for the Board's action was the perfectly permissible ground that the books were indecent, in bad taste, and unsuitable for educational purposes." *Id.*, at 430. He also asserted that in reaching its decision "the Board [had] acted carefully, conscientiously and responsibly after according due process to all parties concerned." *Id.*, at 422. Judge Mansfield concluded that "the First Amendment entitles students to reasonable freedom of expression but not to freedom from what some may consider to be excessively moralistic or conservative selection by school authorities of library books to be used as educational tools." *Id.*, at 432.

Trees students would be required to read.[18] Respondents do not seek in this Court to impose limitations upon their school Board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there. Furthermore, even as to library books, the action before us does not involve the *acquisition* of books. Respondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by the school authorities, or without objection from them.

The substantive question before us is still further constrained by the procedural posture of this case. Petitioners were granted summary judgment by the District Court. The Court of Appeals reversed that judgment, and remanded the action for a trial on the merits of respondents' claims. We can reverse the judgment of the Court of Appeals, and

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[18] Four of respondents' five causes of action complained of petitioners' "resolutions ordering the removal of certain books from the school libraries of the District and prohibiting the use of those books in the curriculum." App. 5. The District Court concluded that "respect for . . . the school board's substantial control over educational content . . . preclude[s] any finding of a first amendment violation arising out of removal of any of the books from use in the curriculum." 474 F. Supp., at 397. This holding is not at issue here. Respondents' fifth cause of action complained that petitioners' "resolutions prohibiting the use of certain books in the curriculum of schools in the District" had "imposed upon teachers in the District arbitrary and unreasonable restrictions upon their ability to function as teachers in violation of principles of academic freedom." App. 6. The District Court held that respondents had not proved this cause of action: "before such a claim may be sustained there must at least be a real, not an imagined controversy." 474 F. Supp., at 397. Respondents have not sought review of that holding in this Court.

grant petitioners' request for reinstatement of the summary judgment in their favor, only if we determine that "there is no genuine issue as to any material fact," and that petitioners are "entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). In making our determination, any doubt as to the existence of a genuine issue of material fact must be resolved against petitioners as the moving party. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157–159 (1970). Furthermore, "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the affidavits, attached exhibits, and depositions submitted below] must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962).

In sum, the issue before us in this case is a narrow one, both substantively and procedurally. It may best be restated as two distinct questions. First, does the First Amendment impose *any* limitations upon the discretion of petitioners to remove library books from the Island Trees High School and Junior High School? Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to respondents, raise a genuine issue of fact whether petitioners might have exceeded those limitations? If we answer either of these questions in the negative, then we must reverse the judgment of the Court of Appeals and reinstate the District Court's summary judgment for petitioners. If we answer both questions in the affirmative, then we must affirm the judgment below. We examine these questions in turn.

A

(1)

The Court has long recognized that local school boards have broad discretion in the management of school affairs. See, *e. g.*, *Meyer* v. *Nebraska*, *supra*, at 402; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534 (1925). *Epperson* v. *Arkan-*

sas, *supra*, at 104, reaffirmed that, by and large, "public education in our Nation is committed to the control of state and local authorities," and that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 507 (1969), noted that we have "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." We have also acknowledged that public schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach* v. *Norwick*, 441 U. S. 68, 76–77 (1979). We are therefore in full agreement with petitioners that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." Brief for Petitioners 10.[19]

At the same time, however, we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. In *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943), we held that under the First Amendment a student in a public school could not be compelled to salute the flag. We reasoned:

> "Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional

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[19] Respondents also agree with these propositions. Tr. of Oral Arg. 28, 41.

> freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*, at 637.

Later cases have consistently followed this rationale. Thus *Epperson* v. *Arkansas* invalidated a State's anti-evolution statute as violative of the Establishment Clause, and reaffirmed the duty of federal courts "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry." 393 U. S., at 104. And *Tinker* v. *Des Moines School Dist.*, *supra*, held that a local school board had infringed the free speech rights of high school and junior high school students by suspending them from school for wearing black armbands in class as a protest against the Government's policy in Vietnam; we stated there that the "comprehensive authority . . . of school officials" must be exercised "consistent with fundamental constitutional safeguards." 393 U. S., at 507. In sum, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id.*, at 506, and therefore local school boards must discharge their "important, delicate, and highly discretionary functions" within the limits and constraints of the First Amendment.

The nature of students' First Amendment rights in the context of this case requires further examination. *West Virginia Board of Education* v. *Barnette*, *supra*, is instructive. There the Court held that students' liberty of conscience could not be infringed in the name of "national unity" or "patriotism." 319 U. S., at 640–641. We explained that

> "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.*, at 642.

Similarly, *Tinker* v. *Des Moines School Dist.*, *supra*, held that students' rights to freedom of expression of their political views could not be abridged by reliance upon an "undifferentiated fear or apprehension of disturbance" arising from such expression:

> "Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this . . . often disputatious society." 393 U. S., at 508–509.

In short, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students." *Id.*, at 506.

Of course, courts should not "intervene in the resolution of conflicts which arise in the daily operation of school systems" unless "basic constitutional values" are "directly and sharply implicate[d]" in those conflicts. *Epperson* v. *Arkansas*, 393 U. S., at 104. But we think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978). And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965). In keeping with this princi-

ple, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); see *Kleindienst* v. *Mandel*, 408 U. S. 753, 762–763 (1972) (citing cases). This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them: "The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it." *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943) (citation omitted). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont* v. *Postmaster General*, 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring).

More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. Madison admonished us:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910).[20]

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[20] For a modern version of this observation, see A. Meiklejohn, Free Speech and Its Relation to Self-Government 26 (1948):

"Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good."

See also *Butler* v. *Michigan*, 352 U. S. 380, 383–384 (1957); *Procunier* v. *Martinez*, 416 U. S. 396, 408–409 (1974); *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 30 (1978) (STEVENS, J., dissenting) ("[T]he First Amendment pro-

As we recognized in *Tinker*, students too are beneficiaries of this principle:

> "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . [S]chool officials cannot suppress 'expressions of feeling with which they do not wish to contend.'" 393 U. S., at 511 (quoting *Burnside* v. *Byars*, 363 F. 2d 744, 749 (CA5 1966)).

In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." *Tinker* v. *Des Moines School Dist.*, 393 U. S., at 506. But the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students.

A school library, no less than any other public library, is "a place dedicated to quiet, to knowledge, and to beauty." *Brown* v. *Louisiana*, 383 U. S. 131, 142 (1966) (opinion of Fortas, J.). *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967), observed that "'students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.'"[21] The school library is the principal locus

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tects not only the dissemination but also the receipt of information and ideas"); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 862–863 (1974) (POWELL, J., dissenting) ("[P]ublic debate must not only be unfettered; it must be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression").

[21] 385 U. S., at 603, quoting *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (opinion of Warren, C. J.).

of such freedom. As one District Court has well put it, in the school library

> "a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. . . . Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom." *Right to Read Defense Committee* v. *School Committee*, 454 F. Supp. 703, 715 (Mass. 1978).

Petitioners emphasize the inculcative function of secondary education, and argue that they must be allowed *unfettered* discretion to "transmit community values" through the Island Trees schools. But that sweeping claim overlooks the unique role of the school library. It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

(2)

In rejecting petitioners' claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content. We thus must turn to the question of the extent to which the First Amendment places limitations upon the discretion of petitioners to remove books from their libraries. In this inquiry we

enjoy the guidance of several precedents. *West Virginia Board of Education* v. *Barnette* stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . . If there are any circumstances which permit an exception, they do not now occur to us." 319 U. S., at 642.

This doctrine has been reaffirmed in later cases involving education. For example, *Keyishian* v. *Board of Regents*, *supra*, at 603, noted that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom;" see also *Epperson* v. *Arkansas*, 393 U. S., at 104–105. And *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274 (1977), recognized First Amendment limitations upon the discretion of a local school board to refuse to rehire a nontenured teacher. The school board in *Mt. Healthy* had declined to renew respondent Doyle's employment contract, in part because he had exercised his First Amendment rights. Although Doyle did not have tenure, and thus "could have been discharged for no reason whatever," *Mt. Healthy* held that he could "nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Id.*, at 283–284. We held further that once Doyle had shown "that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' . . . in the Board's decision not to rehire him," the school board was obliged to show "by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.*, at 287.

With respect to the present case, the message of these precedents is clear. Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books

written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision,[22] then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*. On the other hand, respondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. Tr. of Oral Arg. 36. And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." *Id.*, at 53. In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding

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[22] By "decisive factor" we mean a "substantial factor" in the absence of which the opposite decision would have been reached. See *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977).

today affects only the discretion to *remove* books. In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education* v. *Barnette*, 319 U. S., at 642. Such purposes stand inescapably condemned by our precedents.

B

We now turn to the remaining question presented by this case: Do the evidentiary materials that were before the District Court, when construed most favorably to respondents, raise a genuine issue of material fact whether petitioners exceeded constitutional limitations in exercising their discretion to remove the books from the school libraries? We conclude that the materials do raise such a question, which forecloses summary judgment in favor of petitioners.

Before the District Court, respondents claimed that petitioners' decision to remove the books "was based on [their] personal values, morals and tastes." App. 139. Respondents also claimed that petitioners objected to the books in part because excerpts from them were "anti-American." *Id.*, at 140. The accuracy of these claims was partially conceded by petitioners,[23] and petitioners' own affidavits lent further support to respondents' claims.[24] In addition, the

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[23] Petitioners acknowledged that their "evaluation of the suitability of the books was based on [their] personal values, morals, tastes and concepts of educational suitability." App. 142. But they did not accept, and thus apparently denied, respondents' assertion that some excerpts were objected to as "anti-American." *Ibid.*

[24] For example, petitioner Ahrens stated:

"I am basically a conservative in my general philosophy and feel that the community I represent as a school board member shares that philosophy. . . . I feel that it is my duty to apply my conservative principles to the decision making process in which I am involved as a board member and

record developed in the District Court shows that when petitioners offered their first public explanation for the removal of the books, they relied in part on the assertion that the removed books were "anti-American," and "offensive to . . . Americans in general." 474 F. Supp., at 390.[25] Furthermore, while the Book Review Committee appointed by petitioners was instructed to make its recommendations based upon criteria that appear on their face to be permissible—the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level," App. 67—the Committee's recommendations that five of the books be retained and that only two be removed were essentially rejected by petitioners, without any statement of reasons for doing so. Finally, while petitioners originally defended their removal decision with the explanation that "these books contain obscenities, blasphemies, brutality, and perversion beyond description," 474 F. Supp., at 390, one of the books, A Reader for Writers, was removed even though it contained no such language. 638 F. 2d, at 428, n. 6 (Mansfield, J., dissenting).

I have done so with regard to . . . curriculum formation and content and other educational matters." *Id.*, at 21.

"We are representing the community which first elected us and re-elected us and our actions have reflected its intrinsic values and desires." *Id.*, at 27.

Petitioners Fasulo, Hughes, Melchers, Michaels, and Nessim made a similar statement that they had "represented the basic values of the community in [their] actions." *Id.*, at 120.

[25] When asked to give an example of "anti-Americanism" in the removed books, petitioners Ahrens and Martin both adverted to A Hero Ain't Nothin' But A Sandwich, which notes at one point that George Washington was a slaveholder. See A. Childress, A Hero Ain't Nothin' But A Sandwich 43 (1973); Deposition of Petitioner Ahrens 89; Deposition of Petitioner Martin 20–22. Petitioner Martin stated: "I believe it is anti-American to present one of the nation's heroes, the first President, . . . in such a negative and obviously one-sided life. That is one example of what I would consider anti-American." Deposition of Petitioner Martin 22.

Standing alone, this evidence respecting the substantive motivations behind petitioners' removal decision would not be decisive. This would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite. Petitioners' removal procedures were vigorously challenged below by respondents, and the evidence on this issue sheds further light on the issue of petitioners' motivations.[26] Respondents alleged that in making their removal decision petitioners ignored "the advice of literary experts," the views of "librarians and teachers within the Island Trees School system," the advice of the Superintendent of Schools, and the guidance of publications that rate books for junior and senior high school students. App. 128–129. Respondents also claimed that petitioners' decision was based solely on the fact that the books were named on the PONYU list received by petitioners Ahrens, Martin, and Hughes, and that petitioners "did not undertake an independent review of other books in the [school] libraries." *Id.*, at 129–130. Evidence before the District Court lends support to these claims. The record shows that immediately after petitioners first ordered the books removed from the library shelves, the Superintendent of Schools reminded them that "we already have a policy . . . designed ex-

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[26] We have recognized in numerous precedents that when seeking to distinguish activities unprotected by the First Amendment from other, protected activities, the State must employ "sensitive tools" in order to achieve a precision of regulation that avoids the chilling of protected activities. See, *e. g.*, *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603–604 (1967); *Blount* v. *Rizzi*, 400 U. S. 410, 417 (1971). In the case before us, the presence of such sensitive tools in petitioners' decisionmaking process would naturally indicate a concern on their part for the First Amendment rights of respondents; the absence of such tools might suggest a lack of such concern. See 638 F. 2d, at 416–417 (opinion of Sifton, J.).

pressly to handle such problems," and recommended that the removal decision be approached through this established channel. See n. 4, *supra*. But the Board disregarded the Superintendent's advice, and instead resorted to the extraordinary procedure of appointing a Book Review Committee—the advice of which was later rejected without explanation. In sum, respondents' allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners' removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations.

Construing these claims, affidavit statements, and other evidentiary materials in a manner favorable to respondents, we cannot conclude that petitioners were "entitled to a judgment as a matter of law." The evidence plainly does not foreclose the possibility that petitioners' decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on petitioners' part to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which petitioners and their constituents adhered. Of course, some of the evidence before the District Court might lead a finder of fact to accept petitioners' claim that their removal decision was based upon constitutionally valid concerns. But that evidence at most creates a genuine issue of material fact on the critical question of the credibility of petitioners' justifications for their decision: On that issue, it simply cannot be said that there is no genuine issue as to any material fact.

The mandate shall issue forthwith.

Affirmed.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

While I agree with much in today's plurality opinion, and while I accept the standard laid down by the plurality to

guide proceedings on remand, I write separately because I have a somewhat different perspective on the nature of the First Amendment right involved.

I

To my mind, this case presents a particularly complex problem because it involves two competing principles of constitutional stature. On the one hand, as the dissenting opinions demonstrate, and as we all can agree, the Court has acknowledged the importance of the public schools "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach* v. *Norwick*, 441 U. S. 68, 76 (1979). See, also, *ante*, at 863–864 (plurality opinion). Because of the essential socializing function of schools, local education officials may attempt "to promote civic virtues," *Ambach* v. *Norwick*, 441 U. S., at 80, and to "awake[n] the child to cultural values." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). Indeed, the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government. It therefore seems entirely appropriate that the State use "public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system." *Ambach* v. *Norwick*, 441 U. S., at 77.

On the other hand, as the plurality demonstrates, it is beyond dispute that schools and school boards must operate within the confines of the First Amendment. In a variety of academic settings the Court therefore has acknowledged the force of the principle that schools, like other enterprises operated by the State, may not be run in such a manner as to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943). While none of these cases define the limits of a school board's au-

thority to choose a curriculum and academic materials, they are based on the general proposition that "state-operated schools may not be enclaves of totalitarianism. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 511 (1969).

The Court in *Tinker* thus rejected the view that "a State might so conduct its schools as to 'foster a homogeneous people.'" *Id.*, at 511, quoting *Meyer* v. *Nebraska*, 262 U. S. 390, 402 (1923). Similarly, *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967)—a case that involved the State's attempt to remove "subversives" from academic positions at its universities, but that addressed itself more broadly to public education in general—held that "[t]he classroom is peculiarly the 'marketplace of ideas'"; the First Amendment therefore "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.*, at 603. And *Barnette* is most clearly applicable here: its holding was based squarely on the view that "[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." 319 U. S., at 637. The Court therefore made it clear that imposition of "ideological discipline" was not a proper undertaking for school authorities. *Ibid.*

In combination with more generally applicable First Amendment rules, most particularly the central proscription of content-based regulations of speech, see *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972), the cases outlined above yield a general principle: the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons. Because the school board must perform all its functions "within the limits of the Bill of Rights," *Barnette*, 319 U. S., at 637, this principle necessarily applies in at least a limited way to public education. Surely this is true in an ex-

treme case: as the plurality notes, it is difficult to see how a school board, consistent with the First Amendment, could refuse for political reasons to buy books written by Democrats or by Negroes, or books that are "anti-American" in the broadest sense of that term. Indeed, JUSTICE REHNQUIST appears "cheerfully [to] concede" this point. *Post*, at 907 (dissenting opinion).

In my view, then, the principle involved here is both narrower and more basic than the "right to receive information" identified by the plurality. I do not suggest that the State has any affirmative obligation to provide students with information or ideas, something that may well be associated with a "right to receive." See *post*, at 887 (BURGER, C. J., dissenting); *post*, at 915–918 (REHNQUIST, J., dissenting). And I do not believe, as the plurality suggests, that the right at issue here is somehow associated with the peculiar nature of the school library, see *ante*, at 868–869; if schools may be used to inculcate ideas, surely libraries may play a role in that process.[1] Instead, I suggest that certain forms of state dis-

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[1] As a practical matter, however, it is difficult to see the First Amendment right that I believe is at work here playing a role in a school's choice of curriculum. The school's finite resources—as well as the limited number of hours in the day—require that education officials make sensitive choices between subjects to be offered and competing areas of academic emphasis; subjects generally are excluded simply because school officials have chosen to devote their resources to one rather than to another subject. As is explained below, a choice of this nature does not run afoul of the First Amendment. In any event, the Court has recognized that students' First Amendment rights in most cases must give way if they interfere "with the schools' work or [with] the rights of other students to be secure and to be let alone," *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 508 (1969), and such interference will rise to intolerable levels if public participation in the management of the curriculum becomes commonplace. In contrast, library books on a shelf intrude not at all on the daily operation of a school.

I also have some doubt that there is a theoretical distinction between removal of a book and failure to acquire a book. But as Judge Newman observed, there is a profound practical and evidentiary distinction between

crimination *between* ideas are improper. In particular, our precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.[2]

Certainly, the unique environment of the school places substantial limits on the extent to which official decisions may be restrained by First Amendment values. But that environment also makes it particularly important that *some* limits be imposed. The school is designed to, and inevitably will, inculcate ways of thought and outlooks; if educators intentionally may eliminate all diversity of thought, the school will "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U. S., at 637. As I see it, then, the question in this case is how to make the delicate accommodation between the limited constitutional restriction that I think is imposed by the First Amendment, and the necessarily broad state authority to regulate education. In starker terms, we must reconcile the schools' "inculcative" function with the First Amendment's bar on "prescriptions of orthodoxy."

II

In my view, we strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by

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the two actions: "removal, more than failure to acquire, is likely to suggest that an impermissible political motivation may be present. There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity." 638 F. 2d 404, 436 (CA2 1980) (Newman, J., concurring in result).

[2] In effect, my view presents the obverse of the plurality's analysis: while the plurality focuses on the failure to provide information, I find crucial the State's decision to single out an idea for disapproval and then deny access to it.

the officials' disapproval of the ideas involved. It does not seem radical to suggest that state action calculated to suppress novel ideas or concepts is fundamentally antithetical to the values of the First Amendment. At a minimum, allowing a school board to engage in such conduct hardly teaches children to respect the diversity of ideas that is fundamental to the American system. In this context, then, the school board must "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *Tinker* v. *Des Moines School Dist.*, 393 U. S., at 509, and that the board had something in mind in addition to the suppression of partisan or political views it did not share.

As I view it, this is a narrow principle. School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present. These decisions obviously will not implicate First Amendment values. And even absent space or financial limitations, First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, cf. *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 757 (1978) (POWELL, J., concurring), or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are "manifestly inimical to the public welfare." *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534 (1925). And, of course, school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis.

As is evident from this discussion, I do not share JUSTICE REHNQUIST's view that the notion of "suppression of ideas" is not a useful analytical concept. See *post*, at 918–920 (dissenting opinion). Indeed, JUSTICE REHNQUIST's discussion it-

self demonstrates that "access to ideas" has been given meaningful application in a variety of contexts. See *post*, at 910–920, 914 ("[e]ducation consists of the selective presentation and explanation of ideas"). And I believe that tying the First Amendment right to the *purposeful* suppression of ideas makes the concept more manageable than JUSTICE REHNQUIST acknowledges. Most people would recognize that refusing to allow discussion of current events in Latin class is a policy designed to "inculcate" Latin, not to suppress ideas. Similarly, removing a learned treatise criticizing American foreign policy from an elementary school library because the students would not understand it is an action unrelated to the *purpose* of suppressing ideas. In my view, however, removing the same treatise because it is "anti-American" raises a far more difficult issue.

It is not a sufficient answer to this problem that a State operates a school in its role as "educator," rather than its role as "sovereign," see *post*, at 908–910 (REHNQUIST, J., dissenting), for the First Amendment has application to all the State's activities. While the State may act as "property owner" when it prevents certain types of expressive activity from taking place on public lands, for example, see *post*, at 908–909, few would suggest that the State may base such restrictions on the content of the speaker's message, or may take its action for the purpose of suppressing access to the ideas involved. See *Police Department of Chicago* v. *Mosley*, 408 U. S., at 96. And while it is not clear to me from JUSTICE REHNQUIST's discussion whether a State operates its public libraries in its "role as sovereign," surely difficult constitutional problems would arise if a State chose to exclude "anti-American" books from its public libraries—even if those books remained available at local bookstores.

Concededly, a tension exists between the properly inculcative purposes of public education and any limitation on the school board's absolute discretion to choose academic materials. But that tension demonstrates only that the problem

here is a difficult one, not that the problem should be resolved by choosing one principle over another. As the Court has recognized, school officials must have the authority to make educationally appropriate choices in designing a curriculum: "the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.'" *Barnette*, 319 U. S., at 631, quoting *Minersville School District* v. *Gobitis*, 310 U. S. 586, 604 (1940) (Stone, J., dissenting). Thus school officials may seek to instill certain values "by persuasion and example," 319 U. S., at 640, or by choice of emphasis. That sort of positive educational action, however, is the converse of an intentional attempt to shield students from certain ideas that officials find politically distasteful. Arguing that the majority in the community rejects the ideas involved, see *post*, at 889, 891–892 (BURGER, C. J., dissenting), does not refute this principle: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . ." *Barnette*, 319 U. S., at 638.

As THE CHIEF JUSTICE notes, the principle involved here may be difficult to apply in an individual case. See *post*, at 889 (dissenting opinion). But on a record as sparse as the one before us, the plurality can hardly be faulted for failing to explore every possible ramification of its decision. And while the absence of a record "underscore[s] the views of those of us who originally felt that the cas[e] should not be taken," *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 559 (1957) (opinion of Harlan, J.), the case is here, and must be decided.

Because I believe that the plurality has derived a standard similar to the one compelled by my analysis, I join all but Part II–A(1) of the plurality opinion.

JUSTICE WHITE, concurring in the judgment.

The District Court found that the books were removed from the school library because the school board believed them "to be, in essence, vulgar." 474 F. Supp. 387, 397 (EDNY 1979). Both Court of Appeals judges in the majority concluded, however, that there was a material issue of fact that precluded summary judgment sought by petitioners. The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.

The plurality seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point. When findings of fact and conclusions of law are made by the District Court, that may end the case. If, for example, the District Court concludes after a trial that the books were removed for their vulgarity, there may be no appeal. In any event, if there is an appeal, if there is dissatisfaction with the subsequent Court of Appeals' judgment, and if certiorari is sought and granted, there will be time enough to address the First Amendment issues that may then be presented.

I thus prefer the course taken by the Court in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948), a suit involving overtime compensation under the Fair Labor Standards Act. Summary judgment had been granted by the District Court and affirmed by the Court of Appeals. This Court reversed, holding that summary judgment was improvidently granted, and remanded for trial so that a proper record could be made. The Court expressly abjured issuing its advice on the legal

issues involved. Writing for the Court, Justice Jackson stated:

> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.
>
> "Without intimating any conclusion on the merits, we vacate the judgments below and remand the case to the District Court for reconsideration and amplification of the record in the light of this opinion and of present contentions." *Id.*, at 257.

We took a similar course in a unanimous *per curiam* opinion in *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967). There we overturned a summary judgment since it was necessary to resolve a factual dispute about collaboration between one of the respondents and a state legislative committee. We remanded, saying: "In the absence of the factual refinement which can occur only as a result of trial, we need not and, indeed, could not express judgment as to the legal consequences of such collaboration, if it occurred." *Id.*, at 84.

The *Silas Mason* case turned on issues of statutory construction. It is even more important that we take a similar course in cases like *Dombrowski*, which involved Speech or Debate Clause immunity, and in this one, which poses difficult First Amendment issues in a largely uncharted field. We should not decide constitutional questions until it is necessary to do so, or at least until there is better reason to address them than are evident here. I therefore concur in the judgment of affirmance.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world. In an attempt to deal with a problem in an area traditionally left to the states, a plurality of the Court, in a lavish expansion going beyond any prior holding under the First Amendment, expresses its view that a school board's decision concerning what books are to be in the school library is subject to federal-court review.[1] Were this to become the law, this Court would come perilously close to becoming a "super censor" of school board library decisions. Stripped to its essentials, the issue comes down to two important propositions: *first*, whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and *second*, whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library. In an attempt to place this case within the protection of the First Amendment, the plurality suggests a new "right" that, when shorn of the plurality's rhetoric, allows this Court to impose

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[1] At the outset, the plurality notes that certain school board members found the books in question "objectionable" and "improper" for junior and senior high school students. What the plurality apparently finds objectionable is that the inquiry as to the challenged books was initially stimulated by what is characterized as "a politically conservative organization of parents concerned about education," which had concluded that the books in question were "improper fare for school students." *Ante*, at 856. As noted by the District Court, however, and in the plurality opinion, *ante*, at 859, both parties substantially agreed about the motivation of the school board in removing the books:

"[T]he board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students." 474 F. Supp. 387, 392 (1979).

its own views about what books must be made available to students.[2]

I

A

I agree with the fundamental proposition that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Ante*, at 865. For example, the Court has held that a school board cannot compel a student to participate in a flag salute ceremony, *West Virginia Bd. of Education* v. *Barnette*, 319 U. S. 624 (1943), or *prohibit* a student from expressing certain views, so long as that expression does not disrupt the educational process. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969). Here, however, no restraints of any kind are placed on the students. They are free to read the books in question, which are available at public libraries and bookstores; they are free to discuss them in the classroom or elsewhere. Despite this absence of any direct external control on the students' ability to express themselves, the plurality suggests that there is a new First Amendment "entitlement" to have access to particular books in a school library.

The plurality cites *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), which struck down a state law that restricted the

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[2] In oral argument counsel advised the Court that of the original plaintiffs, only "[o]ne of them is still in school . . . until this June, and will assumedly graduate in June. *There is a potential question of mootness.*" Tr. of Oral Arg. 4–5 (emphasis added). The sole surviving plaintiff has therefore either recently been graduated from high school or is within days or even hours of graduation. Yet the plurality expresses views on a very important constitutional issue. Fortunately, there is no binding holding of the Court on the critical constitutional issue presented.

We do well to remember the admonition of Justice Frankfurter that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." *United States* v. *Lovett*, 328 U. S. 303, 320 (1946) (concurring opinion). In the same vein, Justice Stone warned that "the only check upon our own exercise of power is our own sense of self-restraint." *United States* v. *Butler*, 297 U. S. 1, 79 (1936) (dissenting opinion).

teaching of modern foreign languages in public and private schools, and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), which declared unconstitutional under the Establishment Clause a law banning the teaching of Darwinian evolution, to establish the validity of federal-court interference with the functioning of schools. The plurality finds it unnecessary "to re-enter this difficult terrain," *ante*, at 861, yet in the next breath relies on these very cases and others to establish the previously unheard of "right" of access to particular books in the public school library.[3] The apparent underlying basis of the plurality's view seems to be that students have an enforceable "right" to receive the information and ideas that are contained in junior and senior high school library books. *Ante*, at 866. This "right" purportedly follows "ineluctably" from the sender's First Amendment right to freedom of speech and as a "necessary predicate" to the recipient's meaningful exercise of his own rights of speech, press, and political freedom. *Ante*, at 866–867. No such right, however, has previously been recognized.

It is true that where there is a willing distributor of materials, the government may not impose unreasonable obstacles to dissemination by the third party. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). And where the speaker desires to express certain ideas, the government may not impose unreasonable restraints. *Tinker* v. *Des Moines School Dist.*, *supra*. It does not follow, however, that a school board must affirmatively aid the speaker in his communication with the recipient. In short the plurality suggests today that if a writer has something to say, the government through its schools must be the courier. None of the cases cited by the plurality establish this broad-based proposition.

First, the plurality argues that the right to receive ideas is derived in part from the sender's First Amendment rights to

[3] Of course, it is perfectly clear that, unwise as it would be, the board could wholly dispense with the school library, so far as the First Amendment is concerned.

send them. Yet we have previously held that a sender's rights are not absolute. *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970).[4] Never before today has the Court indicated that the government has an *obligation* to aid a speaker or author in reaching an audience.

Second, the plurality concludes that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Ante*, at 867 (emphasis in original). However, the "right to receive information and ideas," *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969), cited *ante*, at 867, does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government. The plurality cites James Madison to emphasize the importance of having an informed citizenry. *Ibid.* We all agree with Madison, of course, that knowledge is necessary for effective government. Madison's view, however, does not establish a *right* to have particular books retained on the school library shelves if the school board decides that they are inappropriate or irrelevant to the school's mission. Indeed, if the need to have an informed citizenry creates a "right," why is the government not also required to provide ready access to a variety of information? This same need would support a constitutional "right" of the people to have public libraries as part of a new constitutional "right" to continuing adult education.

The plurality also cites *Tinker*, *supra*, to establish that the recipient's right to free speech encompasses a right to have particular books retained on the school library shelf. *Ante*, at 868. But the cited passage of *Tinker* notes only that school officials may not *prohibit* a student from expressing his or her view on a subject unless that expression interferes with

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[4] In *Rowan* a unanimous Court upheld the right of a homeowner to direct the local post office to stop delivery of unwanted materials that the householder viewed as "erotically arousing or sexually provocative."

the legitimate operations of the school. The government does not "contract the spectrum of available knowledge." *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965), cited *ante*, at 866, by choosing not to retain certain books on the school library shelf; it simply chooses not to be the conduit for that particular information. In short, even assuming the desirability of the policy expressed by the plurality, there is not a hint in the First Amendment, or in any holding of this Court, of a "right" to have the government provide continuing access to certain books.

B

Whatever role the government might play as a conduit of information, schools in particular ought not be made a slavish courier of the material of third parties. The plurality pays homage to the ancient verity that in the administration of the public schools "'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" *Ante*, at 864. If, as we have held, schools may legitimately be used as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system," *Ambach* v. *Norwick*, 441 U. S. 68, 77 (1979), school authorities must have broad discretion to fulfill that obligation. Presumably all activity within a primary or secondary school involves the conveyance of information and at least an implied approval of the worth of that information. How are "fundamental values" to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum. In order to fulfill its function, an elected school board *must* express its views on the subjects which are taught to its students. In doing so those elected officials express the views of their community; they may err, of course, and the voters may remove them. It is a startling erosion of the very idea of democratic government to have this Court arrogate to itself the power the plurality asserts today.

The plurality concludes that under the Constitution school boards cannot choose to retain or dispense with books if their discretion is exercised in a "narrowly partisan or political manner." *Ante*, at 870. The plurality concedes that permissible factors are whether the books are "pervasively vulgar," *ante*, at 871, or educationally unsuitable. *Ibid.* "Educational suitability," however, is a standardless phrase. This conclusion will undoubtedly be drawn in many—if not most—instances because of the decisionmaker's content-based judgment that the ideas contained in the book or the idea expressed from the author's method of communication are inappropriate for teenage pupils.

The plurality also tells us that a book may be removed from a school library if it is "pervasively vulgar." But why must the vulgarity be "pervasive" to be offensive? Vulgarity might be concentrated in a single poem or a single chapter or a single page, yet still be inappropriate. Or a school board might reasonably conclude that even "random" vulgarity is inappropriate for teenage school students. A school board might also reasonably conclude that the school board's retention of such books gives those volumes an implicit endorsement. Cf. *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978).

Further, there is no guidance whatsoever as to what constitutes "political" factors. This Court has previously recognized that public education involves an area of broad public policy and "'go[es] to the heart of representative government.'" *Ambach* v. *Norwick*, *supra*, at 74. As such, virtually all educational decisions necessarily involve "political" determinations.

What the plurality views as valid reasons for removing a book at their core involve partisan judgments. Ultimately the federal courts will be the judge of whether the motivation for book removal was "valid" or "reasonable." Undoubtedly the validity of many book removals will ultimately turn on a judge's evaluation of the books. Discretion must be used,

and the appropriate body to exercise that discretion is the local elected school board, not judges.[5]

We can all agree that as a matter of *educational policy* students should have wide access to information and ideas. But the people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy. The plurality fails to recognize the fact that local control of education involves democracy in a microcosm. In most public schools in the United States the *parents* have a large voice in running the school.[6] Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people." A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office. Finally, even if

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[5] Indeed this case is illustrative of how essentially all decisions concerning the retention of school library books will become the responsibility of federal courts. As noted in n. 1, *supra*, the parties agreed that the school board in this case acted not on religious principles but "on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students." Despite this agreement as to motivation, the case is to be remanded for a determination of whether removal was in violation of the standard adopted by the plurality. The school board's error appears to be that it made its own determination rather than relying on experts. *Ante*, at 874–875.

[6] *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968). There are approximately 15,000 school districts in the country. U. S. Bureau of Census, Statistical Abstract of the United States 297 (102d ed. 1981) (Table 495: Number of Local Governments, by Taxing Power and Type, and Public School Systems—States: 1972 and 1977). See also Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention, 59 Texas L. Rev. 477, 506–507, n. 130 (1981).

parents and students cannot convince the school board that book removal is inappropriate, they have alternative sources to the same end. Books may be acquired from bookstores, public libraries, or other alternative sources unconnected with the unique environment of the local public schools.[7]

II

No amount of "limiting" language could rein in the sweeping "right" the plurality would create. The plurality distinguishes library books from textbooks because library books "by their nature are optional rather than required reading." *Ante*, at 862. It is not clear, however, why this distinction requires *greater* scrutiny before "optional" reading materials may be removed. It would appear that required reading and textbooks have a greater likelihood of imposing a "'pall of orthodoxy'" over the educational process than do optional reading. *Ante*, at 870. In essence, the plurality's view transforms the availability of this "optional" reading into a "right" to have this "optional" reading maintained at the demand of teenagers.

The plurality also limits the new right by finding it applicable only to the *removal* of books once acquired. Yet if the First Amendment commands that certain books cannot be *removed*, does it not equally require that the same books be *acquired*? Why does the coincidence of timing become the basis of a constitutional holding? According to the plurality, the evil to be avoided is the "official suppression of ideas." *Ante*, at 871. It does not follow that the decision to *remove* a book is less "official suppression" than the decision not to acquire a book desired by someone.[8] Similarly, a decision to

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[7] Other provisions of the Constitution, such as the Establishment Clause, *Epperson* v. *Arkansas*, *supra*, and the Equal Protection Clause, also limit the discretion of the school board.

[8] The formless nature of the "right" found by the plurality in this case is exemplified by this purported distinction. Presumably a school board could, for any reason, choose not to purchase a book for its library. Once

eliminate certain material from the curriculum, history for example, would carry an equal—probably greater—prospect of "official suppression." Would the decision be subject to our review?

III

Through use of bits and pieces of prior opinions unrelated to the issue of this case, the plurality demeans our function of constitutional adjudication. Today the plurality suggests that the *Constitution* distinguishes between school libraries and school classrooms, between *removing* unwanted books and *acquiring* books. Even more extreme, the plurality concludes that the Constitution *requires* school boards to justify to its teenage pupils the decision to remove a particular book from a school library. I categorically reject this notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom.

JUSTICE POWELL, dissenting.

The plurality opinion today rejects a basic concept of public school education in our country: that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools. After today's decision any junior high school student, by instituting a suit against a school board or teacher, may invite a judge to overrule an educational decision by the official body designated by the people to operate the schools.

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it purchases that book, however, it is "locked in" to retaining it on the school shelf until it can justify a reason for its removal. This anomalous result of "book tenure" was pointed out by the District Court in this case. 474 F. Supp., at 395–396. See also *Presidents Council, District 25* v. *Community School Board No. 25*, 457 F. 2d 289, 293 (CA2 1972). Under the plurality view, if a school board wants to be assured that it maintains control over the education of its students, every page of every book sought to be acquired must be read before a purchase decision is made.

I

School boards are uniquely local and democratic institutions. Unlike the governing bodies of cities and counties, school boards have only one responsibility: the education of the youth of our country during their most formative and impressionable years. Apart from health, no subject is closer to the hearts of parents than their children's education during those years. For these reasons, the governance of elementary and secondary education traditionally has been placed in the hands of a local board, responsible locally to the parents and citizens of school districts. Through parent-teacher associations (PTA's), and even less formal arrangements that vary with schools, parents are informed and often may influence decisions of the board. Frequently, parents know the teachers and visit classes. It is fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board.

I therefore view today's decision with genuine dismay. Whatever the final outcome of this suit and suits like it, the resolution of educational policy decisions through litigation, and the exposure of school board members to liability for such decisions, can be expected to corrode the school board's authority and effectiveness. As is evident from the generality of the plurality's "standard" for judicial review, the decision as to the educational worth of a book is a highly subjective one. Judges rarely are as competent as school authorities to make this decision; nor are judges responsive to the parents and people of the school district.[1]

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[1] The plurality speaks of the need for "sensitive" decisionmaking, pursuant to "regular" procedures. See *ante*, at 874, n. 26, and 875. One wonders what indeed does this mean. In this case, for example, the board did not act precipitously. It simply did not agree with the recommendations of a committee it had appointed. Would the plurality require—as a constitutional matter—that the board delegate unreviewable authority to such a committee?

The new constitutional right, announced by the plurality, is described as a "right to receive ideas" in a school. *Ante*, at 867. As the dissenting opinions of THE CHIEF JUSTICE and JUSTICE REHNQUIST so powerfully demonstrate, however, this newfound right finds no support in the First Amendment precedents of this Court. And even apart from the inappropriateness of judicial oversight of educational policy, the new constitutional right is framed in terms that approach a meaningless generalization. It affords little guidance to courts, if they—as the plurality now authorizes them—are to oversee the inculcation of ideas. The plurality does announce the following standard: A school board's "discretion may not be exercised in a narrowly partisan or political manner." *Ante*, at 870. But this is a standardless standard that affords no more than subjective guidance to school boards, their counsel, and to courts that now will be required to decide whether a particular decision was made in a "narrowly partisan or political manner." Even the "chancellor's foot" standard in ancient equity jurisdiction was never this fuzzy.

As JUSTICE REHNQUIST tellingly observes, how does one limit—on a principled basis—today's new constitutional right? If a 14-year-old child may challenge a school board's decision to remove a book from the library, upon what theory is a court to prevent a like challenge to a school board's decision not to purchase that identical book? And at the even more "sensitive" level of "receiving ideas," does today's decision entitle student oversight of which courses may be added or removed from the curriculum, or even of what a particular teacher elects to teach or not teach in the classroom? Is not the "right to receive ideas" as much—or indeed even more—implicated in these educational questions?[2]

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[2] The plurality suggests that the books in a school library derive special protection under the Constitution because the school library is a place in which students exercise unlimited choice. See *ante*, at 868–869. This sug-

II

The plurality's reasoning is marked by contradiction. It purports to acknowledge the traditional role of school boards and parents in deciding what should be taught in the schools. It states the truism that the schools are "vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" *Ante*, at 864. Yet when a school board, as in this case, takes its responsibilities seriously and seeks to decide what the fundamental values are that should be imparted, the plurality finds a constitutional violation.

Just this Term the Court held, in an opinion I joined, that the children of illegal aliens must be permitted to attend the public schools. See *Plyler* v. *Doe*, *ante*, p. 202. Quoting from earlier opinions, the Court noted that the "'public schoo[l is] a most vital civic institution for the preservation of democratic system of government'" and that the public schools are "the primary vehicle for transmitting 'the values on which our society rests.'" *Ante*, at 221. By denying to illegal aliens the opportunity "to absorb the values and skills upon which our social order rests" the law under review placed a lifelong disability upon these illegal alien children. *Ibid.*

Today the plurality drains much of the content from these apt phrases. A school board's attempt to instill in its students the ideas and values on which a democratic system depends is viewed as an impermissible suppression of other ideas and values on which other systems of government and other societies thrive. Books may not be removed because

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gestion is without support in law or fact. It is contradicted by this very case. The school board in this case does not view the school library as a place in which students pick from an unlimited range of books—some of which may be inappropriate for young people. Rather, the school library is analogous to an assigned reading list within which students may exercise a degree of choice.

they are indecent; extol violence, intolerance, and racism; or degrade the dignity of the individual. Human history, not the least that of the 20th century, records the power and political life of these very ideas. But they are not our ideas or values. Although I would leave this educational decision to the duly constituted board, I certainly would not *require* a school board to promote ideas and values repugnant to a democratic society or to teach such values to *children*.

In different contexts and in different times, the destruction of written materials has been the symbol of despotism and intolerance. But the removal of nine vulgar or racist books from a high school library by a concerned local school board does not raise this specter. For me, today's decision symbolizes a debilitating encroachment upon the institutions of a free people.

Attached as an Appendix hereto is Judge Mansfield's summary of excerpts from the books at issue in this case.

APPENDIX TO OPINION OF POWELL, J., DISSENTING

"The excerpts which led the Board to look into the educational suitability of the books in question are set out (with minor corrections after comparison with the text of the books themselves) below. The pagination and the underlinings are retained from the original report used by the board. In newer editions of some of the books, the quotes appear at different pages.

"1) *SOUL ON ICE* by Eldridge Cleaver
PAGE QUOTE

157–158 ' . . . There are white men who will pay you to fuck their wives. They approach you and say, "How would you like to fuck a white woman?" "What is this?" you ask. "On the up-and-up," he assures you. "It's all right. She's my wife. She needs black rod, is all. She has to have it. It's like a medicine or drug to her. She has to have it. I'll pay you. It's all on the level, no trick involved. Interested?"

You go with him and he drives you to their home. The three of you go into the bedroom. There is a certain type who will leave you and his wife alone and tell you to pile her real good. After it is all over, he will pay you and drive you to wherever you want to go. Then there are some who like to peep at you through a keyhole and watch you have his woman, or peep at you through a window, or lie under the bed and listen to the creaking of the bed as you work out. There is another type who likes to masturbate while he stands beside the bed and watches you pile her. There is the type who likes to eat his woman up after you get through piling her. And there is the type who only wants you to pile her for a little while, just long enough to thaw her out and kick her motor over and arouse her to heat, then he wants you to jump off real quick and he will jump onto her and together they can make it from there by themselves.'

"2) *A HERO AIN'T NOTHING BUT A SANDWICH* by Alice Childress

PAGE QUOTE

10 'Hell, no! *Fuck the society.*'

64–65 'The hell with the junkie, the wino, the capitalist, the welfare checks, the world . . . yeah, and *fuck* you too!'

75–76 'They can have back the spread and curtains, I'm too old for them *fuckin* bunnies anyway.'

"3) *THE FIXER* by Bernard Malamud

PAGE QUOTE

52 'What do you think goes on in the wagon at night: Are the drivers on their knees *fucking their mothers*?'

90 '*Fuck yourself*, said the blinker, etc.'

92 'Who else would do anything like that but a *motherfucking* Zhid?'

146 'No more noise out of you or I'll shoot your *Jew cock off.*'

189 'Also there's a lot of *fucking in the Old Testament*, so how is that religious?'

192 'You better go *fuck yourself*, Bok, said Kogin, I'm onto your Jew tricks.'

215 'Ding-dong giddyap. A *Jew's cock's* in the devil's hock.'
216 'You *cocksucker* Zhid, I ought make you lick it up off the floor.'

"4) *GO ASK ALICE* by Anonymous
PAGE QUOTE
31 'I wonder if sex without acid could be so exciting, so wonderful, so indescribable. I always thought it just took a minute, or that it would be like dogs mating.'
47 'Chris and I walked into Richie and Ted's apartment to find the bastards stoned and making love to each other . . . low class queer.'
81 'shitty, goddamned, pissing, ass, goddamned beJesus, screwing life's, ass, shit. Doris was ten and had *humped* with who knows how many men in between . . . her current stepfather started having sex with her but good . . . *sonofabitch balling her*'
83 'but now when I face a girl its like facing a boy. I get all excited and turned on. *I want to screw with the girl. . . .*'
84 'I'd rather screw with a guy . . . sometimes I want one of the girls to kiss me. I want her to touch me, to have her sleep under me.'
84 'Another day, another *blow job* . . . If I don't give *Big Ass a blow* he'll cut off my supply . . . and LittleJacon is yelling, "Mama, *Daddy can't come now. He's humping Carla.*"
85 'Shit, goddamn, goddamn prick, son-of-a-bitch, ass, pissed, bastard, goddamn, bullshit
94 'I hope you have a *nice orgasm with your dog tonight.*'
110 'You *fucking* Miss Polly pure
117 'Then he said that all I needed was a good *fuck.*'
146 'It might be great because I'm practically a virgin in the sense that I've never had sex except when I've been stoned. . . .'

"5) *SLAUGHTERHOUSE FIVE* by Kurt Vonnegut, Jr.
PAGE QUOTE
29 'Get out of the road, you dumb *motherfucker.*' The last word was still a novelty in the speech of white people in 1944.

It was fresh and astonishing to Billy, who had never *fucked* anybody . . .'

32 'You stake a guy out on an anthill in the desert-see? He's facing upward, and you put *honey* all over his *balls and pecker*, and you cut off his eyelids so he has to stare at the sun till he dies.'

34 'He had a prophylactic kit containing two tough condoms 'For the prevention of disease only!' . . . He had a dirty picture of a *woman* attempting *sexual intercourse with a shetland pony*.'

94 & 95 'But the Gospels actually taught this: Before you kill somebody, make absolutely sure he isn't well connected . . . The flaw in the Christ stories, said the visitor from outer space, was that Christ who didn't look like much, was actually the son of the Most Powerful Being in the Universe. Readers understood that, so, when they came to the crucifixion, they naturally thought . . . Oh boy-they sure picked the wrong guy to lynch this time! And that thought had a brother: There are right people to lynch. People not well connected . . . . The visitor from outer space made a gift to Earth of a new Gospel. In it, Jesus really WAS a nobody, and a pain in the neck to a lot of people with better connections then he had . . . . So the people amused themselves one day by nailing him to a cross and planting the cross in the ground. There couldn't possibly be any repercussions, the lynchers thought . . . since the new Gospel hammered home again and again what a nobody Jesus was. And then just before the nobody died . . . . The voice of God came crashing down. He told the people that he was adopting the bum as his son . . . God said this: *From this moment on, He will punish horribly anybody who torments a bum who has no connections*.'

99 'They told him that there could be no Earthling babies without male homosexuals. There could be babies without female homosexuals.'

120 'Why don't you go *fuck* yourself? Don't think I haven't

tried . . . he was going to have revenge, and that revenge was sweet . . . It's the sweetest thing there is, said Lazzaro. People *fuck* with me, he said, and *Jesus Christ* are they ever fucking sorry.'

122 'And he'll pull out a gun and *shoot his pecker off*. The stranger'll let him think a couple of seconds about who Paul Lazzaro is and what life's gonna be like without a *pecker*. Then he'll shoot him once in the guts and walk away. . . . He died on account of this silly *cocksucker* here. So I promised him I'd have this silly *cocksucker* shot after the war.'

134 'In my prison cell I sit . . . With my *britches full of shit*, And my *balls are bouncing* gently on the floor. And I see the bloody snag when she bit me in the bag . . . Oh, I'll never fuck *a Polack* any more.'

173 'And the peckers of the young men would still be *semi-erect*, and their *muscles* would be *bulging like cannonballs*.'

175 'They didn't have *hard-ons* . . . Everybody else did.'

177 'The magazine, which was published for *lonesome men to jerk off to*.'

178 'and one critic said. . . . 'To describe *blow-jobs* artistically."

"6) *THE BEST SHORT STORIES BY NEGRO WRITERS* Ed. *by Langston Hughes*

PAGE QUOTE

176 'like bat's shit and camel piss,'

228 'that no-count bitch of a daughter of yours is up there up North making a whore of herself.'

237 'they made her get out and stand in front of the headlights of the car and pull down her pants and raise her dress—they said that was the only way they could be sure. And you can imagine what they said and what they did—.'

303 'You need some pussy. Come on, let's go up to the whore house on the hill.'

'Oh, these bastards, these bastards, this God damned Army and the bastards in it. The sons of bitches!'

436 'he produced a brown rag doll, looked at her again, then

grabbed the doll by its legs and tore it part way up the middle. Then he jammed his finger into the rip between the doll's legs. The other men laughed. . . .'

444 'The pimps, hustlers, lesbians, and others trying to misuse me.'

462 'But she had straight firm legs and her breasts were small and upright. No doubt if she'd had children her breasts would be hanging like little empty purses.'

464 'She first became aware of the warm tense nipples on her breasts. Her hands went up gently to clam them.' 'In profile, his penis hung like a stout tassle. She could even tell that he was circumcised.'

406 'Cadillac Bill was busy following Luheaster around, rubbing her stomach and saying, "Magic Stomach, Magic Stomach, bring me a little baby cadillac."' 'One of the girls went upstairs with Red Top and stayed for about forty five minutes.'

"7) *BLACK BOY* by Richard Wright

PAGE QUOTE

70–71 'We black children—seven or eight or nine years of age—used to run to the Jew's store and shout:

. . . Bloody Christ Killers
Never trust a Jew
Bloody Christ Killers
What won't a Jew do . . .
Red, white and blue
Your pa was a Jew
Your ma a dirty dago
What the hell is you?'

265 'Crush that nigger's nuts, nigger!' 'Hit that nigger!' 'Aw, fight, you goddam niggers!' 'Sock 'im, in his f-k-g-piece!' 'Make 'im bleed!'

"8) *LAUGHING BOY* by Oliver LaFarge

PAGE QUOTE

38 'I'll tell you, she is all bad; for two bits she will do the worst thing.'

258–9 'I was frightened when he wanted me to lie with him, but he made me feel all right. He knew all about how to make women forget themselves, that man.'

"9) *THE NAKED APE* by Desmond Morris

PAGE QUOTE

73–74 'Also, the frontal approach provides the maximum possibility for stimulation of the female's clitoris during the pelvic thrusting of the male. It is true that it will be passively, stimulated by the pulling effect of the male's thrusts, regardless of his body position in relation to the female, but in a face-to-face mating there will in addition be the direct rhythmic pressure of the male's pubic region on to the clitoral area, and this will considerably heighten the stimulation . . .' 'So it seems plausible to consider that face-to-face copulation is basic to our species. There are, of course, a number of variations that do not eliminate the frontal element: male above, female above, side by side, squatting, standing, and so on, but the most efficient and commonly used one is with both partners horizontal, the male above the female. . . .'

80 '. . . This broadening of the penis results in the female's external genitals being subjected to much more pulling and pushing during the performance of pelvic thrusts. With each inward thrust of the penis, the clitoral region is pulled downwards and then with each withdrawal, it moves up again. Add to this the rhythmic pressure being exerted on the clitoris region by the pubic region of the frontally copulating male, and you have a repeated massaging of the clitoris that—were she a male—would virtually be masturbatory.'

94–99 '. . . If either males or females cannot for some reason obtain sexual access to their opposite numbers, they will find sexual outlets in other ways. They may use other members of their own sex, or they may even use members of other species, or they may masturbate. . . .'

"10) *READER FOR WRITERS . . .*"

638 F. 2d 404, 419–422, n. 1 (CA2 1980) (Mansfield, J., dissenting).

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

Addressing only those aspects of the constitutional question which must be decided to determine whether or not the District Court was correct in granting summary judgment, I conclude that it was. I agree fully with the views expressed by THE CHIEF JUSTICE, and concur in his opinion. I disagree with JUSTICE BRENNAN's opinion because it is largely hypothetical in character, failing to take account of the facts as admitted by the parties pursuant to local rules of the District Court for the Eastern District of New York, and because it is analytically unsound and internally inconsistent.[1]

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[1] I also disagree with JUSTICE WHITE's conclusion that he need not decide the constitutional issue presented by this case. That view seems to me inconsistent with the "rule of four"—"that any case warranting consideration in the opinion of [four Justices] of the Court will be taken and disposed of" on the merits, *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 560 (1957) (opinion of Harlan, J.)—which we customarily follow in exercising our certiorari jurisdiction. His concurrence, although not couched in such language, is in effect a single vote to dismiss the writ of certiorari as improvidently granted. Justice Harlan debated this issue with Justice Frankfurter in *Ferguson* v. *Moore-McCormack Lines*, *supra*, and his view ultimately attracted the support of six out of the seven remaining Members of the Court. He stated:

"In my opinion due adherence to [the 'rule of four'] requires that once certiorari has been granted a case should be disposed of on the premise that it is properly here, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted. In [this case] I am unable to say that such considerations exist, even though I do think that the arguments on the merits underscored the views of those of us who originally felt that the cas[e] should not be taken because [it] involved only issues of fact, and presented nothing of sufficient general importance to warrant this substantial expenditure of the Court's time." *Id.*, at 559.

The case upon which JUSTICE WHITE relies, *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948), was disposed of in an opinion which commanded the votes of seven of the nine Members of the Court. There could therefore be no question of an infringement of the "rule of four." Certainly any intimation from that case that this Court should not review questions of law in cases where the District Court has granted summary judgment is

I

A

JUSTICE BRENNAN's opinion deals far more sparsely with the procedural posture of this case than it does with the constitutional issues which it conceives to arise under the First Amendment. It first launches into a confusing, discursive exegesis on these constitutional issues as applied to junior high school and high school libraries, *ante*, at 863–872, and only thereafter does it discuss the state of the record before the Court. *Ante*, at 872–875. Because the record facts should always establish the limits of the Court's constitutional analysis, and are particularly relevant in cases where the trial court has granted summary judgment, I think that JUSTICE BRENNAN's approach violates our "long . . . considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945) (citations omitted).

When JUSTICE BRENNAN finally does address the state of the record, he refers to snippets and excerpts of the relevant facts to explain why a grant of summary judgment was improper. But he totally ignores the effect of Rule 9(g) of the local rules of the District Court, under which the parties set forth their version of the disputed facts in this case.[2] Since

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belied by subsequent decisions too numerous to catalogue. See, *e. g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975); *Mills* v. *Alabama*, 384 U. S. 214 (1966).

[2] Rule 9(g) of the local rules of the United States District Court for the Eastern District of New York provides:

"Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

"The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

[Footnote 2 is continued on p. 906]

summary judgment was entered against respondents, they are entitled to have their version of the facts, as embodied in their Rule 9(g) statement, accepted for purposes of our review. Since the parties themselves are presumably the best judges of the extent of the factual dispute between them, however, respondents certainly are not entitled to any more favorable version of the facts than that contained in their own Rule 9(g) statement. JUSTICE BRENNAN's combing through the record of affidavits, school bulletins, and the like for bits and snatches of dispute is therefore entirely beside the point at this stage of the case.

Considering only the respondents' description of the factual aspects of petitioners' motivation, JUSTICE BRENNAN's apparent concern that the Board's action may have been a sinister political plot "to suppress ideas" may be laid to rest. The members of the Board, in deciding to remove these books, were undoubtedly influenced by their own "personal values, morals, and tastes,"[3] just as any member of a school board is apt to be so influenced in making decisions as to whether a book is educationally suitable. Respondents essentially conceded that some excerpts of the removed books "contained profanities, some were sexually explicit, some were ungrammatical, some were anti-American, and some were offensive to racial, religious or ethnic groups."[4]

Respondents also agreed that, "[a]lthough the books them-

"All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

[3] Paragraph 4 of respondents' Rule 9(g) statement asserts that petitioners' "evaluation of the suitability of the books was based on [their] personal values, morals, and tastes." App. 139.

[4] Paragraph 8 of respondents' Rule 9(g) statement reads:

"Defendants Ahrens and Martin objected to those excerpts because some contained profanities, some were sexually explicit, some were ungrammatical, some were anti-American, and some were offensive to racial, religious or ethnic groups." App. 140.

selves were excluded from use in the schools in any way, [petitioners] have not precluded discussion about the themes of the books or the books themselves." App. 140. JUSTICE BRENNAN's concern with the "suppression of ideas" thus seems entirely unwarranted on this state of the record, and his creation of constitutional rules to cover such eventualities is entirely gratuitous. Though for reasons stated in Part II of this opinion I entirely disagree with JUSTICE BRENNAN's treatment of the constitutional issue, I also disagree with his opinion for the entirely separate reason that it is not remotely tailored to the facts presented by this case.

In the course of his discussion, JUSTICE BRENNAN states:

> "Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students . . . . The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*." *Ante*, at 870–871 (emphasis in original).

I can cheerfully concede all of this, but as in so many other cases the extreme examples are seldom the ones that arise in the real world of constitutional litigation. In *this case* the facts taken most favorably to respondents suggest that nothing of this sort happened. The nine books removed undoubtedly did contain "ideas," but in the light of the excerpts from them found in the dissenting opinion of Judge Mansfield in the Court of Appeals, it is apparent that eight of them contained demonstrable amounts of vulgarity and profanity, see 638 F. 2d 404, 419–422, n. 1 (CA2 1980), and the ninth con-

tained nothing that could be considered partisan or political, see *id.*, at 428, n. 6. As already demonstrated, respondents admitted as much. Petitioners did not, for the reasons stated hereafter, run afoul of the First and Fourteenth Amendments by removing these particular books from the library in the manner in which they did. I would save for another day—feeling quite confident that that day will not arrive—the extreme examples posed in JUSTICE BRENNAN's opinion.

B

Considerable light is shed on the correct resolution of the constitutional question in this case by examining the role played by petitioners. Had petitioners been the members of a town council, I suppose all would agree that, absent a good deal more than is present in this record, they could not have prohibited the sale of these books by private booksellers within the municipality. But we have also recognized that the government may act in other capacities than as sovereign, and when it does the First Amendment may speak with a different voice:

> "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968).

By the same token, expressive conduct which may not be prohibited by the State as sovereign may be proscribed by the State as property owner: "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedi-

cated." *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966) (upholding state prohibition of expressive conduct on certain state property).

With these differentiated roles of government in mind, it is helpful to assess the role of government as educator, as compared with the role of government as sovereign. When it acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people. Obviously there are innumerable decisions to be made as to what courses should be taught, what books should be purchased, or what teachers should be employed. In every one of these areas the members of a school board will act on the basis of their own personal or moral values, will attempt to mirror those of the community, or will abdicate the making of such decisions to so-called "experts."[5] In this connection I find myself entirely in agreement with the observation of the Court of Appeals for the Seventh Circuit in *Zykan* v. *Warsaw Community School Corp.*, 631 F. 2d 1300, 1305 (1980), that it is "permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views." In the very course of administering the many-faceted operations of a school district, the mere decision to purchase some books will necessarily preclude the possibility of purchasing others. The decision to teach a particular subject may preclude the possibility of teaching another subject. A decision to replace a teacher because of ineffectiveness may by implication be seen as a disparagement of the subject matter taught. In each of these instances, however, the book or the exposure to the

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[5] There are intimations in JUSTICE BRENNAN's opinion that if petitioners had only consulted literary experts, librarians, and teachers their decision might better withstand First Amendment attack. *Ante*, at 874, and n. 26. These observations seem to me wholly fatuous; surely ideas are no more accessible or no less suppressed if the school board merely ratifies the opinion of some other group rather than following its own opinion.

subject matter may be acquired elsewhere. The managers of the school district are not proscribing it as to the citizenry in general, but are simply determining that it will not be included in the curriculum or school library. In short, actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign.

II

JUSTICE BRENNAN would hold that the First Amendment gives high school and junior high school students a "right to receive ideas" in the school. *Ante*, at 867. This right is a curious entitlement. It exists only in the library of the school, and only if the idea previously has been acquired by the school in book form. It provides no protection against a school board's decision not to acquire a particular book, even though that decision denies access to ideas as fully as removal of the book from the library, and it prohibits removal of previously acquired books only if the remover "dislike[s] the ideas contained in those books," even though removal for any other reason also denies the students access to the books. *Ante*, at 871–872.

But it is not the limitations which JUSTICE BRENNAN places on the right with which I disagree; they simply demonstrate his discomfort with the new doctrine which he fashions out of whole cloth. It is the very existence of a right to receive information, in the junior high school and high school setting, which I find wholly unsupported by our past decisions and inconsistent with the necessarily selective process of elementary and secondary education.

A

The right described by JUSTICE BRENNAN has never been recognized in the decisions of this Court and is not supported by their rationale. JUSTICE BRENNAN correctly observes that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Tinker v. *Des Moines School District*, 393 U. S. 503, 506 (1969). But, as this language from *Tinker* suggests, our past decisions in this area have concerned freedom of speech and expression, not the right of access to particular ideas. We have held that students may not be prevented from symbolically expressing their political views by the wearing of black arm bands, *Tinker* v. *Des Moines School District*, *supra*, and that they may not be forced to participate in the symbolic expression of saluting the flag, *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943). But these decisions scarcely control the case before us. Neither the District Court nor the Court of Appeals found that petitioners' removal of books from the school libraries infringed respondents' right to speak or otherwise express themselves.

Despite JUSTICE BRENNAN's suggestion to the contrary, this Court has never held that the First Amendment grants junior high school and high school students a right of access to certain information in school. It is true that the Court has recognized a limited version of that right in other settings, and JUSTICE BRENNAN quotes language from five such decisions and one of his own concurring opinions in order to demonstrate the viability of the right-to-receive doctrine. *Ante*, at 866–867. But not one of these cases concerned or even purported to discuss elementary or secondary educational institutions.[6] JUSTICE BRENNAN brushes over this significant

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[6]The right of corporations to make expenditures or contributions in order to influence ballot issues was the question presented in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978), and the language which JUSTICE BRENNAN quotes from that decision, *ante*, at 866, was explicitly limited to "the Court's decisions involving corporations in the business of communications or entertainment." 435 U. S., at 783. In *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972), the Court upheld the power of Congress and the Executive Branch to prevent the entry into this country of a Marxist theoretician who had been invited to lecture at an American university, despite the First Amendment rights of citizens who wished to hear him. *Stanley* v. *Georgia*, 394 U. S. 557 (1969), held that the First Amendment prohibits States from making the private possession of ob-

omission in First Amendment law by citing *Tinker* v. *Des Moines School District* for the proposition that "students too are beneficiaries of this [right-to-receive] principle." *Ante*, at 868. But *Tinker* held no such thing. One may read *Tinker* in vain to find any recognition of a First Amendment right to receive information. *Tinker*, as already mentioned, was based entirely on the students' right to *express* their political views.

Nor does the right-to-receive doctrine recognized in our past decisions apply to schools by analogy. JUSTICE BRENNAN correctly characterizes the right of access to ideas as "an inherent corollary of the rights of free speech and press" which "follows ineluctably from the *sender's* First Amendment right to send them." *Ante*, at 867 (emphasis in original). But he then fails to recognize the predicate right to speak from which the students' right to receive must follow. It would be ludicrous, of course, to contend that all authors have a constitutional right to have their books placed in junior high school and high school libraries. And yet without such a right our prior precedents would not recognize the reciprocal right to receive information. JUSTICE BRENNAN disregards this inconsistency with our prior cases and fails to explain the constitutional or logical underpinnings of a right to hear ideas in a place where no speaker has the right to express them.

JUSTICE BRENNAN also correctly notes that the reciprocal nature of the right to receive information derives from the fact that it "is a necessary predicate to the *recipient's* mean-

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scene material a crime, and *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), held that the right of privacy prohibits States from forbidding the use of contraceptives. Finally, *Martin* v. *Struthers*, 319 U. S. 141 (1943), held that the First Amendment protects the door-to-door distribution of religious literature.

JUSTICE BRENNAN's concurring opinion appears in a case which considered the constitutionality of certain postal statutes. *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965).

ingful exercise of his own rights of speech, press, and political freedom." *Ibid.* (emphasis in original). But the denial of access to ideas inhibits one's own acquisition of knowledge only when that denial is relatively complete. If the denied ideas are readily available from the same source in other accessible locations, the benefits to be gained from exposure to those ideas have not been foreclosed by the State. This fact is inherent in the right-to-receive cases relied on by JUSTICE BRENNAN, every one of which concerned the complete denial of access to the ideas sought.[7] Our past decisions are thus unlike this case where the removed books are readily available to students and nonstudents alike at the corner bookstore or the public library.

B

There are even greater reasons for rejecting JUSTICE BRENNAN's analysis, however, than the significant fact that we have never adopted it in the past. "The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, has long been recognized by our decisions." *Ambach* v. *Norwick*, 441 U. S. 68, 76 (1979). Pub-

[7] In *First National Bank of Boston* v. *Bellotti*, *supra*, public access to corporate viewpoints on ballot issues not directly affecting the corporations was foreclosed by the Massachusetts law prohibiting corporate expenditures to express such viewpoints. In *Kleindienst* v. *Mandel*, *supra*, the Court noted that the potential recipients of Mandel's ideas were completely deprived of the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning." 408 U. S., at 765. The Georgia law in *Stanley* v. *Georgia*, *supra*, criminalized all private possession of obscene material, and the statute in *Griswold* v. *Connecticut*, *supra*, criminalized all use of contraceptive devices or actions encouraging the use of such devices. The ordinance at issue in *Martin* v. *Struthers*, *supra*, forbade all door-to-door distribution of religious literature, while the statute challenged in *Lamont* v. *Postmaster General*, *supra*, required persons receiving Communist propaganda in the mails affirmatively to state their desire to receive such mailings.

lic schools fulfill the vital role of teaching students the basic skills necessary to function in our society, and of "inculcating fundamental values necessary to the maintenance of a democratic political system." *Id.*, at 77. The idea that such students have a right of access, *in the school*, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education.

Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students' individual development. Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.

JUSTICE BRENNAN rejects this idea, claiming that it "overlooks the unique role of the school library." *Ante*, at 869. But the unique role referred to appears to be one of JUSTICE BRENNAN's own creation. No previous decision of this Court attaches unique First Amendment significance to the libraries of elementary and secondary schools. And in his paean of praise to such libraries as the "environment especially appropriate for the recognition of the First Amendment rights of students," *ante*, at 868, JUSTICE BRENNAN turns to language about *public* libraries from the three-Justice plurality in *Brown* v. *Louisiana*, 383 U. S. 131 (1966), and to language about universities and colleges from *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). *Ante*, at 868. Not only is his

authority thus transparently thin, but also, and more importantly, his reasoning misapprehends the function of libraries in our public school system.

As already mentioned, elementary and secondary schools are inculcative in nature. The libraries of such schools serve as supplements to this inculcative role. Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas. Thus, JUSTICE BRENNAN cannot rely upon the nature of school libraries to escape the fact that the First Amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas.

After all else is said, however, the most obvious reason that petitioners' removal of the books did not violate respondents' right to receive information is the ready availability of the books elsewhere. Students are not denied books by their removal from a school library. The books may be borrowed from a public library, read at a university library, purchased at a bookstore, or loaned by a friend. The government as educator does not seek to reach beyond the confines of the school. Indeed, following the removal from the school library of the books at issue in this case, the local public library put all nine books on display for public inspection. Their contents were fully accessible to any inquisitive student.

C

JUSTICE BRENNAN's own discomfort with the idea that students have a right to receive information from their elementary or secondary schools is demonstrated by the artificial limitations which he places upon the right—limitations which are supported neither by logic nor authority and which are inconsistent with the right itself. The attempt to confine the right to the library is one such limitation, the fallacies of which have already been demonstrated.

As a second limitation, JUSTICE BRENNAN distinguishes the act of removing a previously acquired book from the act of refusing to acquire the book in the first place: "[N]othing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. [O]ur holding today affects only the discretion to *remove* books." *Ante*, at 871–872 (emphasis in original). If JUSTICE BRENNAN truly has found a "right to receive ideas," *ante*, at 866–867, however, this distinction between acquisition and removal makes little sense. The failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf. As a result of either action the book cannot be found in the "principal locus" of freedom discovered by JUSTICE BRENNAN. *Ante*, at 868.

The justification for this limiting distinction is said by JUSTICE BRENNAN to be his concern in this case with "the suppression of ideas." *Ante*, at 871. Whatever may be the analytical usefulness of this appealing sounding phrase, see Part II–D, *infra*, the suppression of ideas surely is not the identical twin of the denial of access to information. Not every official act which denies access to an idea can be characterized as a suppression of the idea. Thus unless the "right to receive information" and the prohibition against "suppression of ideas" are each a kind of Mother-Hubbard catch phrase for whatever First Amendment doctrines one wishes to cover, they would not appear to be interchangeable.

JUSTICE BRENNAN's reliance on the "suppression of ideas" to justify his distinction between acquisition and removal of books has additional logical pitfalls. Presumably the distinction is based upon the greater visibility and the greater sense of conscious decision thought to be involved in the removal of a book, as opposed to that involved in the refusal to acquire a book. But if "suppression of ideas" is to be the talisman, one would think that a school board's public announcement of its refusal to acquire certain books would have every bit as much

impact on public attention as would an equally publicized decision to remove the books. And yet only the latter action would violate the First Amendment under JUSTICE BRENNAN's analysis.

The final limitation placed by JUSTICE BRENNAN upon his newly discovered right is a motive requirement: the First Amendment is violated only "[i]f petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed." *Ante*, at 871 (emphasis in original). But bad motives and good motives alike deny access to the books removed. If JUSTICE BRENNAN truly recognizes a constitutional right to receive information, it is difficult to see why the reason for the denial makes any difference. Of course JUSTICE BRENNAN's view is that intent matters because the First Amendment does not tolerate an officially prescribed orthodoxy. *Ante*, at 870–872. But this reasoning mixes First Amendment apples and oranges. The right to receive information differs from the right to be free from an officially prescribed orthodoxy. Not every educational denial of access to information casts a pall of orthodoxy over the classroom.

It is difficult to tell from JUSTICE BRENNAN's opinion just what motives he would consider constitutionally impermissible. I had thought that the First Amendment proscribes content-based restrictions on the marketplace of ideas. See *Widmar* v. *Vincent*, 454 U. S. 263, 269–270 (1981). JUSTICE BRENNAN concludes, however, that a removal decision based solely upon the "educational suitability" of a book or upon its perceived vulgarity is "'perfectly permissible.'" *Ante*, at 871 (quoting Tr. of Oral Arg. 53). But such determinations are based as much on the content of the book as determinations that the book espouses pernicious political views.

Moreover, JUSTICE BRENNAN's motive test is difficult to square with his distinction between acquisition and removal. If a school board's removal of books might be motivated by a desire to promote favored political or religious views, there is

no reason that its acquisition policy might not also be so motivated. And yet the "pall of orthodoxy" cast by a carefully executed book-acquisition program apparently would not violate the First Amendment under JUSTICE BRENNAN's view.

D

Intertwined as a basis for JUSTICE BRENNAN's opinion, along with the "right to receive information," is the statement that "[o]ur Constitution does not permit the official suppression of *ideas*." *Ante*, at 871 (emphasis in original). There would be few champions, I suppose, of the idea that our Constitution *does* permit the official suppression of ideas; my difficulty is not with the admittedly appealing catchiness of the phrase, but with my doubt that it is really a useful analytical tool in solving difficult First Amendment problems. Since the phrase appears in the opinion "out of the blue," without any reference to previous First Amendment decisions of this Court, it would appear that the Court for years has managed to decide First Amendment cases without it.

I would think that prior cases decided under established First Amendment doctrine afford adequate guides in this area without resorting to a phrase which seeks to express "a complicated process of constitutional adjudication by a deceptive formula." *Kovacs* v. *Cooper*, 336 U. S. 77, 96 (1949) (Frankfurter, J., concurring). A school board which publicly adopts a policy forbidding the criticism of United States foreign policy by any student, any teacher, or any book on the library shelves is indulging in one kind of "suppression of ideas." A school board which adopts a policy that there shall be no discussion of current events in a class for high school sophomores devoted to second-year Latin "suppresses ideas" in quite a different context. A teacher who had a lesson plan consisting of 14 weeks of study of United States history from 1607 to the present time, but who because of a week's illness is forced to forgo the most recent 20 years of American history, may "suppress ideas" in still another way.

I think a far more satisfactory basis for addressing these kinds of questions is found in the Court's language in *Tinker* v. *Des Moines School District*, where we noted:

> "[A] particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." 393 U. S., at 510–511.

In the case before us the petitioners may in one sense be said to have "suppressed" the "ideas" of vulgarity and profanity, but that is hardly an apt description of what was done. They ordered the removal of books containing vulgarity and profanity, but they did not attempt to preclude discussion about the themes of the books or the books themselves. App. 140. Such a decision, on respondents' version of the facts in this case, is sufficiently related to "educational suitability" to pass muster under the First Amendment.

E

The inconsistencies and illogic of the limitations placed by JUSTICE BRENNAN upon his notion of the right to receive ideas in school are not here emphasized in order to suggest that they should be eliminated. They are emphasized because they illustrate that the right itself is misplaced in the elementary and secondary school setting. Likewise, the criticism of JUSTICE BRENNAN's newly found prohibition against the "suppression of ideas" is by no means intended to suggest that the Constitution permits the suppression of ideas; it is rather to suggest that such a vague and imprecise phrase, while perhaps wholly consistent with the First Amendment, is simply too diaphanous to assist careful decision of cases such as this one.

I think the Court will far better serve the cause of First Amendment jurisprudence by candidly recognizing that the role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator. It must also be recognized that the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning. Cf. *Tilton* v. *Richardson*, 403 U. S. 672, 685–686 (1971) (opinion of BURGER, C. J.). With respect to the education of children in elementary and secondary schools, the school board may properly determine in many cases that a particular book, a particular course, or even a particular area of knowledge is not educationally suitable for inclusion within the body of knowledge which the school seeks to impart. Without more, this is not a condemnation of the book or the course; it is only a determination akin to that referred to by the Court in *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388 (1926): "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."

III

Accepting as true respondents' assertion that petitioners acted on the basis of their own "personal values, morals and tastes," App. 139, I find the actions taken in this case hard to distinguish from the myriad choices made by school boards in the routine supervision of elementary and secondary schools. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968). In this case respondents' rights of free speech and expression were not infringed, and by respondents' own admission no ideas were "suppressed." I would leave to another day the harder cases.

JUSTICE O'CONNOR, dissenting.

If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it. As JUSTICE REHNQUIST persuasively argues, the plurality's analysis overlooks the fact that in this case the government is acting in its special role as educator.

I do not personally agree with the Board's action with respect to some of the books in question here, but it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards. It is the school board that must determine educational suitability, and it has done so in this case. I therefore join THE CHIEF JUSTICE's dissent.

LUGAR *v.* EDMONDSON OIL CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80–1730. Argued December 8, 1981—Decided June 25, 1982

This case concerns the relationship between the requirement of "state action" to establish a violation of the Fourteenth Amendment, and the requirement of action "under color of state law" to establish a right to recover under 42 U. S. C. § 1983, which provides a remedy for deprivation of constitutional rights when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage" of a State. Respondents filed suit in Virginia state court on a debt owed by petitioner, and sought prejudgment attachment of certain of petitioner's property. Pursuant to Virginia law, respondents alleged, in an *ex parte* petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors; acting upon that petition, a Clerk of the state court issued a writ of attachment, which was executed by the County Sheriff; a hearing on the propriety of the attachment was later conducted; and 34 days after the levy the trial judge dismissed the attachment for respondents' failure to establish the alleged statutory grounds for attachment. Petitioner then brought this action in Federal District Court under § 1983, alleging that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law. The District Court held that the alleged actions of the respondents did not constitute state action as required by the Fourteenth Amendment, and that the complaint therefore did not state a valid claim under § 1983. The Court of Appeals affirmed, but on the basis that the complaint failed to allege conduct under color of state law for purposes of § 1983 because there was neither usurpation or corruption of official power by a private litigant nor a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer was compromised to a significant degree.

Held:

1. Constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor in securing the property in dispute. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337. And if the challenged conduct of the creditor constitutes state action as delimited by this Court's prior decisions, then that conduct is also action under color of state law and will support a suit under § 1983. Pp. 926–935.

2. Conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be fairly attributable to the State. In determining the question of "fair attribution," (a) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Pp. 936–939.

3. Insofar as petitioner alleged only misuse or abuse by respondents of Virginia law, he did not state a cause of action under § 1983, but challenged only private action. Such challenged conduct could not be ascribed to any governmental decision, nor did respondents have the authority of state officials to put the weight of the State behind their private decision. However, insofar as petitioner's complaint challenged the state statute as being procedurally defective under the Due Process Clause, he did present a valid cause of action under § 1983. The statutory scheme obviously is the product of state action, and a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. Respondents were, therefore, acting under color of state law in participating in the deprivation of petitioner's property. Pp. 939–942.

639 F. 2d 1058, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post*, p. 943. POWELL, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 944.

Robert L. Morrison, Jr., argued the cause and filed a brief for petitioner.

James W. Haskins argued the cause for respondents. With him on the brief was *H. Victor Millner, Jr.*

JUSTICE WHITE delivered the opinion of the Court.

The Fourteenth Amendment of the Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as "state action."

Title 42 U. S. C. § 1983 provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . ."[1] This case concerns the relationship between the § 1983 requirement of action under color of state law and the Fourteenth Amendment requirement of state action.

I

In 1977, petitioner, a lessee-operator of a truckstop in Virginia, was indebted to his supplier, Edmondson Oil Co., Inc. Edmondson sued on the debt in Virginia state court. Ancillary to that action and pursuant to state law, Edmondson sought prejudgment attachment of certain of petitioner's property. Va. Code § 8.01–533 (1977).[2] The prejudgment attachment procedure required only that Edmondson allege, in an *ex parte* petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. This effectively sequestered petitioner's

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[1] Title 42 U. S. C. § 1983, at the time in question, provided in full:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] At the time of the attachment in question, this section was codified as Va. Code § 8–519 (1973).

property, although it was left in his possession. Pursuant to the statute, a hearing on the propriety of the attachment and levy was later conducted. Thirty-four days after the levy, a state trial judge ordered the attachment dismissed because Edmondson had failed to establish the statutory grounds for attachment alleged in the petition.[3]

Petitioner subsequently brought this action under 42 U. S. C. § 1983 against Edmondson and its president. His complaint alleged that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law. The lower courts construed the complaint as alleging a due process violation both from a misuse of the Virginia procedure and from the statutory procedure itself.[4] He sought compensatory and punitive damages for specified financial loss allegedly caused by the improvident attachment.

Relying on *Flagg Brothers, Inc.* v. *Brooks*, 436 U. S. 149 (1978), the District Court held that the alleged actions of the respondents did not constitute state action as required by the Fourteenth Amendment and that the complaint therefore did not state a claim upon which relief could be granted under § 1983. Petitioner appealed; the Court of Appeals for the Fourth Circuit, sitting en banc, affirmed, with three dissenters.[5] 639 F. 2d 1058 (1981).

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[3] The principal action then proceeded to the entry of judgment on the debt in favor of Edmondson and some of petitioner's property was sold in execution of the judgment.

[4] In his answer to respondents' motion to dismiss on abstention grounds petitioner stated that "[n]o question of the constitutional validity of the State statutes is made." Plaintiff's Memorandum in Opposition to Motion to Dismiss 3. The District Court responded to this as follows: "[D]espite plaintiff's protests to the contrary . . . the complaint can only be read as challenging the constitutionality of Virginia's attachment statute." App. to Pet. for Cert. 38. The Court of Appeals agreed. 639 F. 2d 1058, 1060, n. 1 (CA4 1981).

[5] The case was originally argued before a three-judge panel. The Court of Appeals, however, acting *sua sponte*, set the matter for a rehearing en banc.

The Court of Appeals rejected the District Court's reliance on *Flagg Brothers* in finding that the requisite state action was missing in this case. The participation of state officers in executing the levy sufficiently distinguished this case from *Flagg Brothers*. The Court of Appeals stated the issue as follows:

> "[W]hether the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within contemplation of § 1983." 639 F. 2d, at 1061–1062 (footnote omitted).

The court distinguished between the acts directly chargeable to respondents and the larger context within which those acts occurred, including the direct levy by state officials on petitioner's property. While the latter no doubt amounted to state action, the former was not so clearly action under color of state law. The court held that a private party acts under color of state law within the meaning of § 1983 only when there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree. Because the court thought none of these elements was present here, the complaint failed to allege conduct under color of state law.

Because this construction of the under-color-of-state-law requirement appears to be inconsistent with prior decisions of this Court, we granted certiorari. 452 U. S. 937 (1981).

II

Although the Court of Appeals correctly perceived the importance of *Flagg Brothers* to a proper resolution of this case,

it misread that case.[6] It also failed to give sufficient weight to that line of cases, beginning with *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), in which the Court considered constitutional due process requirements in the context of garnishment actions and prejudgment attachments. See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972). Each of these cases involved a finding of state action as an implicit predicate of the application of due process standards. *Flagg Brothers* distinguished them on the ground that in each there was overt, official involvement in the property deprivation; there was no such overt action by a state officer in *Flagg Brothers*. 436 U. S., at 157. Although this case falls on the *Sniadach*, and not the *Flagg Brothers*, side of this distinction, the Court of Appeals thought the garnishment and attachment cases to be irrelevant because none but *Fuentes* arose under 42 U. S. C. § 1983 and because *Fuentes* was distinguishable.[7]

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[6] JUSTICE POWELL suggests that our opinion is not "consistent with the mode of inquiry prescribed by our cases." *Post*, at 946. We believe the situation to be just the opposite. We rely precisely upon the ground that the majority itself put forth in *Flagg Brothers* to distinguish that case from the earlier prejudgment attachment cases: "This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies." 436 U. S., at 157. JUSTICE POWELL at no point mentions this aspect of the *Flagg Brothers* decision. The method of inquiry we adopt is that suggested by *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970), and seemingly approved in *Flagg Brothers:* Joint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a § 1983 claim against a private party.

[7] The Court of Appeals held *Fuentes* v. *Shevin* not to be relevant because the defendants in that case included the State Attorney General, as well as the private creditor. In the court's view, the presence of a state official made the "private party defendant . . . merely a nominal party to the action for injunctive relief." 639 F. 2d, at 1068, n. 22. Judge Butzner, in dissent, found *Fuentes* to be directly controlling.

It determined that it could ignore all of them because the issue in this case was not whether there was state action, but rather whether respondents acted under color of state law.

As we see it, however, the two concepts cannot be so easily disentangled. Whether they are identical or not, the state-action and the under-color-of-state-law requirements are obviously related.[8] Indeed, until recently this Court did not distinguish between the two requirements at all.

A

In *United States* v. *Price*, 383 U. S. 787, 794, n. 7 (1966), we explicitly stated that the requirements were identical: "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."[9] In support of this proposition the Court cited *Smith* v. *Allwright*, 321 U. S. 649 (1944), and *Terry* v. *Adams*, 345 U. S. 461 (1953).[10] In both of these

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[8] The Court of Appeals itself recognized this when it stated that in two of three basic patterns of § 1983 litigation—that in which the defendant is a public official and that in which he is a private party—there is no distinction between state action and action under color of state law. Only when there is joint action by private parties and state officials, the court stated, could a distinction arise between these two requirements.

[9] We also stated that if an indictment "allege[s] conduct on the part of the 'private' defendants which constitutes 'state action,' [it alleges] action 'under color' of law within [18 U. S. C.] § 242." 383 U. S., at 794, n. 7. In *Monroe* v. *Pape*, 365 U. S. 167, 185 (1961), the Court held that "under color of law" has the same meaning in 18 U. S. C. § 242 as it does in § 1983.

[10] Besides these two Supreme Court cases, the Court cited a number of lower court cases in support of the proposition that the constitutional concept of state action satisfies the statutory requirement of action under color of state law. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (CA4 1963); *Smith* v. *Holiday Inns*, 336 F. 2d 630 (CA6 1964); *Hampton* v. *City of Jacksonville*, 304 F. 2d 320 (CA5 1962); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (CA5 1960); *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (CA4 1945). Each of these cases involved litigation between private parties in which the plaintiffs alleged unconstitutional discrimination. In each case, the only inquiry was whether the private-party defendant met the state-action requirement of the Fourteenth Amend-

cases black voters in Texas challenged their exclusion from party primaries as a violation of the Fifteenth Amendment and sought relief under 8 U. S. C. § 43 (1946 ed.).[11] In each case, the Court understood the problem before it to be whether the discriminatory policy of a private political association could be characterized as "state action within the meaning of the Fifteenth Amendment." *Smith*, *supra*, at 664.[12] Having found state action under the Constitution, there was no further inquiry into whether the action of the political associations also met the statutory requirement of action "under color of state law."

Similarly, it is clear that in a § 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. The Court's conclusion in *United States* v. *Classic*, 313 U. S. 299, 326 (1941), that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law," was founded on the rule announced in *Ex parte Virginia*, 100 U. S. 339, 346–347 (1880), that the actions of a state officer who exceeds the limits of his authority constitute state action for purposes of the Fourteenth Amendment.[13]

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ment. Once that requirement was met, the courts granted the relief sought.

[11] Title 8 U. S. C. § 43 (1946 ed.) was reclassified as 42 U. S. C. § 1983 in 1952.

[12] There was no opinion for the Court in *Terry* v. *Adams*. All three opinions in support of the reversal of the lower court decision pose the question as to whether the action of the private political association in question, the Jaybird Democratic Association, constituted state action for purposes of the Fifteenth Amendment. None suggests that a Fifteenth Amendment violation by the private association might not support a cause of action because of a failure to prove action under color of state law.

[13] *United States* v. *Classic* did not involve § 1983 directly; rather, it interpreted 18 U. S. C. § 242 (then 18 U. S. C. § 52 (1940 ed.)), which is the criminal counterpart of 42 U. S. C. § 1983. See n. 9, *supra*, on the relationship between 18 U. S. C. § 242 and 42 U. S. C. § 1983.

The decision of the Court of Appeals rests on a misreading of *Flagg Brothers*. In that case the Court distinguished two elements of a § 1983 action:

> "[Plaintiffs] are first bound to show that they have been deprived of a right 'secured by the Constitution and the laws' of the United States. They must secondly show that Flagg Brothers deprived them of this right acting 'under color of any statute' of the State of New York. It is clear that these two elements denote two separate areas of inquiry. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 150 (1970)." 436 U. S., at 155–156.

Plaintiffs' case foundered on the first requirement. Because a due process violation was alleged and because the Due Process Clause protects individuals only from governmental and not from private action, plaintiffs had to demonstrate that the sale of their goods was accomplished by state action. The Court concluded that the sale, although authorized by state law, did not amount to state action under the Fourteenth Amendment, and therefore set aside the Court of Appeals' contrary judgment.

There was no reason in *Flagg Brothers* to address the question whether there was action under color of state law. The Court expressly eschewed deciding whether that requirement was satisfied by private action authorized by state law. *Id.*, at 156. Although the state-action and under-color-of-state-law requirements are "separate areas of inquiry," *Flagg Brothers* did not hold nor suggest that state action, if present, might not satisfy the § 1983 requirement of conduct under color of state law. Nevertheless, the Court of Appeals relied on *Flagg Brothers* to conclude in this case that state action under the Fourteenth Amendment is not necessarily action under color of state law for purposes of § 1983. We do not agree.

The two-part approach to a § 1983 cause of action, referred to in *Flagg Brothers*, was derived from *Adickes* v.

S. H. Kress & Co., 398 U. S. 144, 150 (1970). *Adickes* was a § 1983 action brought against a private party, based on a claim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Although stating that the § 1983 plaintiff must show both that he has been deprived "of a right secured by the 'Constitution and laws' of the United States" and that the defendant acted "under color of any statute . . . of any State," *ibid.*, we held that the private party's joint participation with a state official in a conspiracy to discriminate would constitute both "state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights" and action "'under color' of law for purposes of the statute." *Id.*, at 152.[14] In

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[14] The *Adickes* opinion contained the following statement, 398 U. S., at 162, n. 23: "Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute." This statement obviously was meant neither to establish the definition of action under color of state law, nor to establish a distinction between this statutory requirement and the constitutional standard of state action. The statement was made in response to an argument that the discrimination by the private party was pursuant to the state trespass statute and that this would satisfy the requirements of § 1983. The Court rejected this because there had been no factual showing that the defendants had acted with knowledge of, or pursuant to, this statute. It was in this context, that this statement was made.

JUSTICE BRENNAN, writing separately, did suggest in *Adickes* that "when a private party acts alone, more must be shown . . . to establish that he acts 'under color of' a state statute or other authority than is needed to show that his action constitutes state action." *Id.*, at 210 (footnote omitted). Even in his view, however, when a private party acts in conjunction with a state official, whatever satisfies the state-action requirement of the Fourteenth Amendment satisfies the under-color-of-state-law requirement of the statute. JUSTICE BRENNAN's position rested, at least in part, on a much less strict standard of what would constitute "state action" in the area of racial discrimination than that adopted by the majority. In any case, the position he articulated there has never been adopted by the Court.

support of our conclusion that a private party held to have violated the Fourteenth Amendment "can be liable under § 1983," *ibid.*, we cited that part of *United States* v. *Price*, 383 U. S., at 794, n. 7, in which we had concluded that state action and action under color of state law are the same (quoted *supra*, at 928). *Adickes* provides no support for the Court of Appeals' novel construction of § 1983.[15]

B

The decision of the Court of Appeals is difficult to reconcile with the Court's garnishment and prejudgment attachment cases and with the congressional purpose in enacting § 1983.

Beginning with *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), the Court has consistently held that constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers

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[15] JUSTICE POWELL's discussion of *Adickes* confuses the two counts of the complaint in that case. There was a conspiracy count which alleged that respondent—a private party—and a police officer had conspired "(1) 'to deprive [petitioner] of her right to enjoy equal treatment and service in a place of public accommodation'; and (2) to cause her arrest 'on the false charge of vagrancy.'" *Id.*, at 149–150. It was with respect to this count, which did not allege any unconstitutional statute or custom, that the Court held that joint action of the private party and the police officer was sufficient to support a § 1983 suit against that party. The other count of her complaint was a substantive count in which she alleged that the private act of discrimination was pursuant to a "custom of the community to segregate the races in public eating places." Here the Court did not rely on any "joint action" theory, but held that "petitioner would show an abridgment of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom." *Id.*, at 171, 173. JUSTICE POWELL is wrong when he summarizes *Adickes* as holding that "a private party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity." *Post*, at 954–955. This is to confuse the conspiracy and the substantive counts at issue in *Adickes*. Unless one argues that the state vagrancy law was unconstitutional—an argument no one made in *Adickes*—the joint action count of *Adickes* did not involve a state law, whether "plainly unconstitutional" or not.

of the State act jointly with a creditor in securing the property in dispute. *Sniadach* and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975), involved state-created garnishment procedures; *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974), involved execution of a vendor's lien to secure disputed property. In each of these cases state agents aided the creditor in securing the disputed property; but in each case the federal issue arose in litigation between creditor and debtor in the state courts and no state official was named as a party. Nevertheless, in each case the Court entertained and adjudicated the defendant-debtor's claim that the procedure under which the private creditor secured the disputed property violated federal constitutional standards of due process. Necessary to that conclusion is the holding that private use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment.

Fuentes v. *Shevin*, 407 U. S. 67 (1972), was a § 1983 action brought against both a private creditor and the State Attorney General. The plaintiff sought declaratory and injunctive relief, on due process grounds, from continued enforcement of state statutes authorizing prejudgment replevin. The plaintiff prevailed; if the Court of Appeals were correct in this case, there would have been no § 1983 cause of action against the private parties. Yet they remained parties, and judgment ran against them in this Court.[16]

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[16] We thus find incomprehensible JUSTICE POWELL's statement that we cite no cases in which a private decision to invoke a presumptively valid state legal process has been held to be state action. *Post*, at 950. Likewise, his discussion of these cases, *post*, at 952–953, steadfastly ignores the predicate for the holding in each case that the debtor could challenge the constitutional adequacy of the private creditor's seizure of his property. That predicate was necessarily the principle that a private party's invocation of a seemingly valid prejudgment remedy statute, coupled with the aid of a state official, satisfies the state-action requirement of the Fourteenth Amendment and warrants relief against the private party.

If a defendant debtor in state-court debt collection proceedings can successfully challenge, on federal due process grounds, the plaintiff creditor's resort to the procedures authorized by a state statute, it is difficult to understand why that same behavior by the state-court plaintiff should not provide a cause of action under § 1983. If the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, § 1983, designed to provide judicial redress for just such constitutional violations.

To read the "under color of any statute" language of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the § 1983 cause of action would be wholly inconsistent with the purpose of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, from which § 1983 is derived. The Act was passed "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.'" *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 545 (1972). The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual. Perhaps the most direct statement of this was that of Senator Edmunds, the manager of the bill in the Senate: "[Section 1 is] so very simple and really reenact[s] the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871). Representative Bingham similarly stated that the bill's purpose was "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution." *Id.*, App. 81.[17]

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[17] In fact, throughout the congressional debate over the 1871 Act, the bill was officially described as a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." See also, *e. g.*, remarks of Senator Trumbull in describing the purpose of the House in passing the Act: "[A]s the bill passed the House of

In sum, the line drawn by the Court of Appeals is inconsistent with our prior cases and would substantially undercut the congressional purpose in providing the § 1983 cause of action. If the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983.[18]

Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guarantied to them by the Constitution and laws of the United States," Cong. Globe, 42d Cong., 1st Sess., 579 (1871); and remarks of Representative Shellabarger on the relationship between § 1 of the bill and the Fourteenth Amendment, *id.*, App. 68.

[18] Our conclusion in this case is not inconsistent with the statement in *Flagg Brothers* that "these two elements [state action and action under color of state law] denote two separate areas of inquiry." 436 U. S., at 155–156. First, although we hold that conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth Amendment requirement of state action. If action under color of state law means nothing more than that the individual act "with the knowledge of and pursuant to that statute," *Adickes* v. *S. H. Kress & Co.*, 398 U. S., at 162, n. 23, then clearly under *Flagg Brothers* that would not, in itself, satisfy the state-action requirement of the Fourteenth Amendment. Second, although we hold in this case that the under-color-of-state-law requirement does not add anything not already included within the state-action requirement of the Fourteenth Amendment, § 1983 is applicable to other constitutional provisions and statutory provisions that contain no state-action requirement. Where such a federal right is at issue, the statutory concept of action under color of state law would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right.

Nor is our decision today inconsistent with *Polk County* v. *Dodson*, 454 U. S. 312 (1981). In *Polk County*, we held that a public defender's actions, when performing a lawyer's traditional functions as counsel in a state criminal proceeding, would not support a § 1983 suit. Although we analyzed the public defender's conduct in light of the requirement of action "under color of state law," we specifically stated that it was not necessary in that case to consider whether that requirement was identical to the

III

As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that "most rights secured by the Constitution are protected only against infringement by governments," *Flagg Brothers*, 436 U. S., at 156. As the Court said in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 349 (1974):

> "In 1883, this Court in the *Civil Rights Cases*, 109 U. S. 3, affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."

Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of

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"state action" requirement of the Fourteenth Amendment: "Although this Court has sometimes treated the questions as if they were identical, see *United States* v. *Price*, 383 U. S. 787, 794, and n. 7 (1966), we need not consider their relationship in order to decide this case." *Id.*, at 322, n. 12. We concluded there that a public defender, although a state employee, in the day-to-day defense of his client, acts under canons of professional ethics in a role adversarial to the State. Accordingly, although state employment is generally sufficient to render the defendant a state actor under our analysis, *infra*, at 937, it was "peculiarly difficult" to detect any action of the State in the circumstances of that case. 454 U. S., at 320. In *Polk County*, we also rejected respondent's claims against governmental agencies because he "failed to allege any policy that arguably violated his rights under the Sixth, Eighth, or Fourteenth Amendments." *Id.*, at 326. Because respondent failed to challenge any rule of conduct or decision for which the State was responsible, his allegations would not support a claim of state action under the analysis proposed below. *Infra*, at 937. Thus, our decision today does not suggest a different outcome in *Polk County*.

their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. In *Sniadach*, *Fuentes*, *W. T. Grant*, and *North Georgia*, for example, a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights could be exercised. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Although related, these two principles are not the same. They collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions. See *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961). The two principles diverge when the constitutional claim is directed against a party without such apparent authority, *i. e.*, against a private party. The difference between the two inquiries is well illustrated by comparing *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972), with *Flagg Brothers*, *supra*.

In *Moose Lodge*, the Court held that the discriminatory practices of the appellant did not violate the Equal Protection Clause because those practices did not constitute "state action." The Court focused primarily on the question of

whether the admittedly discriminatory policy could in any way be ascribed to a governmental decision.[19] The inquiry, therefore, looked to those policies adopted by the State that were applied to appellant. The Court concluded as follows:

> "We therefore hold, that with the exception hereafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to . . . make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." 407 U. S., at 177.

In other words, the decision to discriminate could not be ascribed to any governmental decision; those governmental decisions that did affect Moose Lodge were unconnected with its discriminatory policies.[20]

Flagg Brothers focused on the other component of the state-action principle. In that case, the warehouseman proceeded under New York Uniform Commercial Code, § 7–210, and the debtor challenged the constitutionality of that provision on the grounds that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Undoubtedly the State was responsible for the statute. The response of the Court, however, focused not on the terms of the statute but on the character of the defendant to the § 1983

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[19] There are elements of the other state-action inquiry in the opinion as well. This is found primarily in the effort to distinguish the relationship of Moose Lodge and the State from that between the State and the restaurant considered in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). See 407 U. S., at 175.

[20] The "one exception" further illustrates this point. The Court enjoined enforcement of a state rule requiring Moose Lodge to comply with its own constitution and bylaws insofar as they contained racially discriminatory provisions. State enforcement of this rule, either judicially or administratively, would, under the circumstances, amount to a governmental decision to adopt a racially discriminatory policy.

suit: Action by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a "state actor." The Court suggested that that "something more" which would convert the private party into a state actor might vary with the circumstances of the case. This was simply a recognition that the Court has articulated a number of different factors or tests in different contexts: *e. g.*, the "public function" test, see *Terry* v. *Adams*, 345 U. S. 461 (1953); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); the "state compulsion" test, see *Adickes* v. *S. H. Kress & Co.*, 398 U. S., at 170; the "nexus" test, see *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); and, in the case of prejudgment attachments, a "joint action test," *Flagg Brothers*, 436 U. S., at 157.[21] Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here. See *Burton*, *supra*, at 722 ("Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance").

IV

Turning to this case, the first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as "state actors."

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[21] Contrary to the suggestion of JUSTICE POWELL's dissent, we do not hold today that "a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the § 1983 requirement of action under color of law." *Post*, at 951. The holding today, as the above analysis makes clear, is limited to the particular context of prejudgment attachment.

Both the District Court and the Court of Appeals noted the ambiguous scope of petitioner's contentions: "There has been considerable confusion throughout the litigation on the question whether Lugar's ultimate claim of unconstitutional deprivation was directed at the Virginia statute itself or only at its erroneous application to him." 639 F. 2d, at 1060, n. 1. Both courts held that resolution of this ambiguity was not necessary to their disposition of the case: both resolved it, in any case, in favor of the view that petitioner was attacking the constitutionality of the statute as well as its misapplication. In our view, resolution of this issue is essential to the proper disposition of the case.

Petitioner presented three counts in his complaint. Count three was a pendent claim based on state tort law; counts one and two claimed violations of the Due Process Clause. Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, opressive *[sic]*, [and] unlawful acts." By "unlawful," petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, *i. e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe* v. *Pape*, 365 U. S. 167 (1961). That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.

Count one is a different matter. That count describes the procedures followed by respondents in obtaining the prejudgment attachment as well as the fact that the state court subsequently ordered the attachment dismissed because respondents had not met their burden under state law. Pe-

titioner then summarily states that this sequence of events deprived him of his property without due process. Although it is not clear whether petitioner is referring to the state-created procedure or the misuse of that procedure by respondents, we agree with the lower courts that the better reading of the complaint is that petitioner challenges the state statute as procedurally defective under the Fourteenth Amendment.[22]

While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well.

As is clear from the discussion in Part II, we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in *Adickes* v. *S. H. Kress & Co.*, *supra*, at 152, in the context of an equal protection deprivation:

> "'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,'" quoting *United States* v. *Price*, 383 U. S., at 794.

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[22] This confusion in the nature of petitioner's allegations continued in oral argument in this Court. Although at various times counsel for petitioner seemed to deny that petitioner challenged the constitutionality of the statute, see, *e. g.*, Tr. of Oral Arg. 11, he also stated that

"[t]he claim is that the action as taken, even if it were just line by line in accordance with Virginia law—whether or not they did it right, the claim is that it was in violation of Lugar's constitutional rights." *Id.*, at 19.

The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of state-created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.

In summary, petitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation. Petitioner did present a valid cause of action under § 1983 insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute.[22]

The judgment is reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[22] JUSTICE POWELL is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconsitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture. What we said in *Adickes*, 398 U. S., at 174, n. 44, when confronted with this question is just as applicable today: "We intimate no views concerning the relief that might be appropriate if a violation is shown. The parties have not briefed these remedial issues, and if a violation is proved they are best explored in the first instance below in light of the new record that will be developed on remand. Nor do we mean to determine at this juncture whether there are any defenses available to defendants in § 1983 actions like the one at hand. Cf. *Pierson* v. *Ray*, 386 U. S. 547 (1967)" (citations omitted).

CHIEF JUSTICE BURGER, dissenting.

Whether we are dealing with suits under § 1983 or suits brought pursuant to the Fourteenth Amendment, in my view the inquiry is the same: is the claimed infringement of a federal right fairly attributable to the State. *Rendell-Baker* v. *Kohn*, *ante*, at 838. Applying this standard, it cannot be said that the actions of the named respondents are fairly attributable to the State.* Respondents did no more than invoke a presumptively valid state prejudgment attachment procedure available to all. Relying on a dubious "but for" analysis, the Court erroneously concludes that the subsequent procedural steps taken by the State in attaching a putative debtor's property in some way transforms respondents' acts into actions of the State. This case is no different from the situation in which a private party commences a lawsuit and secures injunctive relief which, even if temporary, may cause significant injury to the defendant. Invoking a judicial process, of course, implicates the State and its officers but does not transform essentially private conduct into actions of the State. *Dennis* v. *Sparks*, 449 U. S. 24 (1980). Similarly, one who practices a trade or profession, drives an automobile, or builds a house under a state license is not engaging in acts fairly attributable to the state. In both *Dennis* and the instant case petitioner's remedy lies in private suits for damages such as malicious prosecution. The Court's opinion expands the reach of the statute beyond anything intended by Congress. It may well be a consequence of too casually falling into a semantical trap because of the figurative use of the term "color of state law."

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*The pleadings in this case amply demonstrate that the challenged conduct was directed solely at respondents' acts. The unlawful actions alleged were that respondents made "conclusory allegations," App. 5, respondents lacked a "factual basis" for attachment, *id.*, at 10, and respondents lacked "good cause to believe facts which would support" attachment. *Id.*, at 19. There is no allegation of collusion or conspiracy with state actors.

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

Today's decision is a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with law. The case began nearly five years ago as the outgrowth of a simple suit on a debt in a Virginia state court. Respondent—a small wholesale oil dealer in Southside, Va.—brought suit against petitioner Lugar, a truckstop owner who had failed to pay a debt.[1] The suit was to collect this indebtedness. Fearful that petitioner might dissipate his assets before the debt was collected, respondent also filed a petition in state court seeking sequestration of certain of Lugar's assets. He did so under a Virginia statute, traceable at least to 1819, that permits creditors to seek prejudgment attachment of property in the possession of debtors.[2] No court had questioned the validity of the statute, and it remains presumptively valid. The Clerk of the state court duly issued a writ of attachment, and the County Sheriff then executed it. There is no allegation that respondent conspired with the state officials to deny petitioner the fair protection of state or federal law.

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[1] The state action, filed in the name of the Edmondson Oil Co., alleged that Lugar owed $41,983 for products and merchandise previously delivered. App. 22. In the present suit Lugar has named as defendants both the Edmondson Oil Co. and its president, Ronald Barbour. As the respondent Barbour is the sole stockholder of Edmondson Oil Co., *id.*, at 2, and appears to have directed all its actions in this litigation, see *id.*, at 26, I refer throughout to Barbour as if he were the sole respondent.

[2] See Va. Code § 8.01–533 *et seq.* (1977). At the time of the attachment in this case, the applicable provisions were Va. Code § 8–519 *et seq.* (1973). The Virginia attachment provisions have remained essentially in their present form despite numerous recodifications since 1819. See Va. Code § 8–519 *et seq.* (1950); Va. Code § 6378 *et seq.* (1919); Va. Code § 2959 *et seq.* (1887); Va. Code, ch. 151 (1849); Va. Code, ch. 123 (1819).

Respondent ultimately prevailed in his lawsuit. The petitioner Lugar was ordered by a court to pay his debt. A state court did find, however, that Lugar's assets should not have been attached prior to a judgment on the underlying action.

Following this decision Lugar instituted legal action in the United States District Court for the Western District of Virginia. Suing under a federal statute, 42 U. S. C. § 1983, Lugar alleged that the respondent—by filing a petition in state court—had acted "under color of law" *and* had caused the deprivation of constitutional rights under the Fourteenth Amendment—an Amendment that does not create rights enforceable against private citizens, such as one would have assumed respondent to be, but only against the States. *Rendell-Baker* v. *Kohn*, *ante*, at 837; *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 156 (1978); *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948); *Civil Rights Cases*, 109 U. S. 3, 11 (1883).[3] Both the District Court and the Court of Appeals agreed that petitioner had no cause of action under § 1983. They sensibly found that respondent could not be held responsible for any deprivation of constitutional rights and that the suit did not belong in federal court.

This Court today reverses the judgment of those lower courts. It holds that respondent, a private citizen who did no more than commence a legal action of a kind traditionally initiated by private parties, thereby engaged in "state action." This decision is as unprecedented as it is implausible. It is plainly unjust to the respondent, and the Court makes no

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[3] Title 42 U. S. C. § 1983, at the time in question, provided:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

argument to the contrary. Respondent, who was represented by counsel, could have had no notion that his filing of a petition in state court, in the effort to secure payment of a private debt, made him a "state actor" liable in damages for allegedly unconstitutional action by the Commonwealth of Virginia. Nor is the Court's analysis consistent with the mode of inquiry prescribed by our cases. On the contrary, the Court undermines fundamental distinctions between the common-sense categories of state and private conduct and between the legal concepts of "state action" and private action "under color of law."

I

The plain language of 42 U. S. C. § 1983 establishes that a plaintiff must satisfy two jurisdictional requisites to state an actionable claim. First, he must allege the violation of a right "secured by the Constitution and laws" of the United States. Because "most rights secured by the Constitution are protected only against infringement by governments," *Flagg Bros., Inc.* v. *Brooks*, 436 U. S., at 156, this requirement compels an inquiry into the presence of state action. Second, a § 1983 plaintiff must show that the alleged deprivation was caused by a person acting "under color" of law. In *Flagg Bros.*, this Court affirmed that "these two elements denote two separate areas of inquiry." *Id.*, at 155–156. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152 (1970).

This case demonstrates why separate inquiries are required. Here it is not disputed that the Virginia Sheriff and Clerk of Court, the state officials who sequestered petitioner's property in the manner provided by Virginia law, engaged in state action. Yet the petitioner, while alleging constitutional injury from this action by state officials, did not sue the State or its agents. In these circumstances the Court of Appeals correctly stated that the relevant inquiry was the second identified in *Flagg Bros.*: whether the respondent, a private citizen whose only action was to invoke a presumptively valid state attachment process, had acted under color of state law in "causing" the State to deprive peti-

tioner of alleged constitutional rights.[4] Consistently with past decisions of this Court, the Court of Appeals concluded that respondent's private conduct had not occurred under color of law.

Rejecting the reasoning of the Court of Appeals, the Court opinion inexplicably conflates the two inquiries mandated by *Flagg Bros.* Ignoring that this case involves two sets of actions—one by respondent, who merely filed a suit and accompanying sequestration petition; another by the state officials, who issued the writ and executed the lien—it wrongly frames the question before the Court, not as whether the private respondent acted under color of law in filing the petition, but as "whether . . . respondents, who are private parties, may be appropriately characterized as 'state actors.'" *Ante*, at 939. It then concludes that they may, on the theory that a private party who invokes "the aid of state officials to take advantage of state-created attachment procedures" is a "joint participant" with the State and therefore a "state actor." "The rule," the Court asserts, is as follows:

> "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in a joint activity with the State or its agents." *Ante*, at 941, quoting *Adickes* v. *S. H. Kress & Co.*, *supra*, at 152, in turn quoting *United States* v. *Price*, 383 U. S. 787, 794 (1966).

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[4] Judge Phillips' excellent opinion for the en banc Court of Appeals correctly defined the question presented as "whether the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within the contemplation of § 1983." 639 F. 2d 1058, 1061–1062 (CA4 1981) (footnote omitted).

There are at least two fallacies in the Court's conclusion. First, as is apparent from the quotation, our cases have *not* established that private "joint participants" with state officials themselves necessarily become state actors. Where private citizens interact with state officials in the pursuit of merely private ends, the appropriate inquiry generally is whether the private parties have acted "under color of law." Second, even when the inquiry is whether an action occurred under color of law, our cases make clear that the "joint participation" standard is not satisfied when a private citizen does no more than invoke a presumptively valid judicial process in pursuit only of legitimate private ends.

II

As this Court recognized in *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961), the historic purpose of § 1983 was to prevent state officials from using the cloak of their authority under state law to violate rights protected against state infringement by the Fourteenth Amendment.[5] The Court accordingly is correct that an important inquiry in a § 1983 suit against a private party is whether there is an allegation of wrongful "conduct that can be attributed to the State." *Ante*, at 941. This is the first question referred to in *Flagg Bros.* But there still remains the second *Flagg Bros.* question: whether this state action fairly can be attributed to the respondent, whose

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[5] State officials acting in their official capacities, even if in abuse of their lawful authority, generally are held to act "under color" of law. *E. g.*, *Monroe* v. *Pape*, 365 U. S., at 171–172; *Ex parte Virginia*, 100 U. S. 339, 346–347 (1880). This is because such officials are "clothed with the authority" of state law, which gives them power to perpetrate the very wrongs that Congress intended § 1983 to prevent. *United States* v. *Classic*, 313 U. S. 299, 326 (1941); *Ex parte Virginia*, *supra*, at 346–347. Cf. *Polk County* v. *Dodson*, 454 U. S. 312 (1981) (a public defender, representing an indigent client in a criminal proceeding, performs a function for which the authority of his state office is not needed, and therefore does not act under color of state law when engaged in a defense attorney's traditionally private roles).

only action was to invoke a presumptively valid attachment statute. This question, unasked by the Court, reveals the fallacy of its conclusion that respondent may be held accountable for the attachment of property because he was a "state actor."[6] From the occurrence of state action taken by the Sheriff who sequestered petitioner's property, it does not follow that respondent became a "state actor" simply because the Sheriff was. This Court, until today, has never endorsed this non sequitur.

It of course is true that respondent's private action was *followed* by state action, and that the private and the state actions were not unconnected. But "[t]hat the State responds to [private] actions by [taking action of its own] does not render it *responsible* for those [private] actions." *Blum* v. *Yaretsky*, *post*, at 1005. See *Flagg Bros.*, 436 U. S., at 164–165; *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357 (1974). And where the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered "state action" within the meaning of our cases. See, *e. g.*, *Blum* v. *Yaretsky*, *post*, at 1004–1005; *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 172–173 (1972). As in *Jackson* v. *Metropolitan Edison Co.*, *supra*, "[r]espondent's exercise of the choice allowed by state law where

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[6] The Court, *ante*, at 928, quotes *United States* v. *Price*, 383 U. S. 787, 794, n. 7 (1966), as establishing that "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." In *Price*, however, the *same* conduct by the same actors constituted both "state action" and the action "under color" of law. See 383 U. S., at 794, n. 7 (if an indictment alleges "conduct on the part of the 'private' defendants which constitutes 'state action,' [it also alleges] action 'under color of law' . . ."). The situation in this case is quite different. The present case involves "state action" by the Sheriff—action that also was "under color of law" under *Price*. But the real question here is whether the conduct of the private respondent constituted *either* state action or action under color of law. The *Price* quotation plainly does not resolve this question. And the cases cited in *Price*, on which the Court also relies, are similarly inapposite.

the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." 419 U. S., at 357 (footnote omitted).

This Court of course has held that private parties are amenable to suit under § 1983 when "jointly engaged" with state officials in the violation of constitutional rights. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970).[7] Yet the Court, in advancing its "joint participation" theory, does not cite a single case in which a private decision to invoke a presumptively valid state legal process has been held to constitute state action. Even the quotation on which the Court principally relies for its statement of the applicable "rule," *ante*, at 941, does not refer to state action. Rather, it states explicitly that "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."

As illustrated by this quotation, our cases have recognized a distinction between "state action" and private action under "color of law." This distinction is sound in principle. It also is consistent with and supportive of the distinction between "private" conduct and government action that is subject to the procedural limitations of the Due Process Clause of the Fourteenth Amendment. As the Court itself notes: "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Ante*, at 936.

A "color of law" inquiry acknowledges that private individuals, engaged in unlawful joint behavior with state officials, may be *personally* responsible for wrongs that they cause to occur. But it does not confuse private actors with the

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[7] In *Adickes* the term "jointly engaged" appears to have been used specifically to connote engagement in a "conspiracy." See 398 U. S., at 152–153.

State—the fallacy of the analysis adopted today by the Court. In this case involving the private action of the respondent in petitioning the state courts of Virginia, the appropriate inquiry as to respondent's liability is not whether he was a state actor, but whether he acted under color of law. It is to this question that I therefore turn.

III

Contrary to the position of the Court, our cases do not establish that a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action under color of law. In *Dennis* v. *Sparks*, 449 U. S. 24 (1980), we held that private parties acted under color of law when corruptly conspiring with a state judge in a joint scheme to defraud. In so holding, however, we explicitly stated that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.*, at 28. This conclusion is reinforced by our more recent decision in *Polk County* v. *Dodson*, 454 U. S. 312 (1981). As we held to be true with respect to the defense of a criminal defendant, invocation of state legal process is "essentially a private function . . . for which state office and authority are not needed." *Id.*, at 319. These recent decisions make clear that independent, private decisions made in the context of litigation cannot be said to occur under color of law.[8] The Court nevertheless advances two principal grounds for its holding to the contrary.

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[8] The Court avers that its holding "is limited to the particular context of prejudgment attachment." *Ante*, at 939, n. 21. However welcome, this limitation lacks a principled basis. It is unclear why a private party engages in state action when filing papers seeking an attachment of property, but not when seeking other relief (*e. g.*, an injunction), or when summoning police to investigate a suspected crime.

A

The Court argues that petitioner's action under § 1983 is supported by cases in which this Court has applied due process standards to state garnishment and prejudgment attachment procedures. The Court relies specifically on *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974); and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975). According to the Court, these cases establish that a private party acts "under color" of law when seeking the attachment of property under an unconstitutional state statute.[9] In fact, a careful reading demonstrates that they provide no authority for this proposition.

Of the cases cited by the Court, *Sniadach*, *Mitchell*, and *Di-Chem* all involved attacks on the validity of state attachment or garnishment statutes. None of the cases alleged that the private creditor was a joint actor with the State, and none involved a claim for damages against the creditor. Each case involved a state suit, not a federal action under § 1983. It therefore was unnecessary in any of these cases for this Court to consider whether the creditor, by virtue of instituting the attachment or garnishment, became a state actor or acted under color of state law. There is not one word in any of these cases that so characterizes the private creditor.[10] In *Fuentes* v. *Shevin*, the Court did consider a

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[9] At one stage in the litigation the respondent averred that his lawsuit raised "[n]o question of the constitutional validity of the State statutes." Plaintiff's Memorandum in Opposition to Motion to Dismiss 3. The District Court nevertheless concluded that "the complaint can only be read as challenging the constitutionality of Virginia's attachment statute." App. to Pet. for Cert. 38. The Court of Appeals agreed. 639 F. 2d, at 1060, and n. 1.

[10] The Court finds support for its contrary view only by reading these cases as implicitly embracing the same fallacy as the Court does today. In *Sniadach*, *Mitchell*, and *Di-Chem*—as in this case—there was no question that state action had occurred. There, as here, some official of the State—an undisputed state actor—had undertaken either to attach property or

§ 1983 action against a private creditor as well as the State Attorney General.[11] Again, however, the only question before this Court was the validity of a state statute. No claim was made that the creditor was a joint actor with the State or had acted under color of law. No damages were sought from the creditor. Again, there was no occasion for this Court to consider the status under § 1983 of the private party, and there is not a word in the opinion that discusses this. As with *Sniadach*, *Mitchell*, and *Di-Chem*, *Fuentes* thus fails to establish that a private party's mere invocation of state attachment or garnishment procedures represents action under color of law—even in a case in which those procedures are subsequently held to be unconstitutional.

B

In addition to relying on cases involving the constitutionality of state attachment and garnishment statutes, the Court advances a "joint participation" theory based on *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970). In *Adickes* the plaintiff sued a private restaurant under § 1983, alleging a *conspiracy* between the restaurant and local police to deprive her of the right to equal treatment in a place of public accommodation. *Id.*, at 152, 153. Reversing the decision below, this Court upheld the cause of action. It found that the private defendant, in "conspiring" with local police to obtain official enforcement of a state custom of racial segregation, engaged in a "'joint activity with the State or its agents'"

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garnish wages. For the Court, the occurrence of state action by these state officials *ipso facto* establishes that the private plaintiffs also must have been viewed as state actors. Given the presence of state action by the state officials, however, there was no need to inquire whether the private parties also were state actors. It is plain from the opinions that the Court did not do so. Nor, in cases arising in state court, was there any need to consider whether the private defendants had acted under color of law within the meaning of § 1983.

[11] *Fuentes* was consolidated with a case involving similar facts, *Epps* v. *Cortese*, 326 F. Supp. 127 (ED Pa. 1971).

and therefore acted under color of law within the meaning of § 1983. *Id.*, at 152 (quoting *United States* v. *Price*, 383 U. S., at 794).

Contrary to the suggestion of the Court, however, Justice Harlan's Court opinion in *Adickes* did not purport to define the term "under color of law." Attending closely to the facts presented, the Court observed that *"[w]hatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . .* we think it essential that he act with the knowledge of and pursuant to that statute." 398 U. S., at 162, n. 23 (emphasis added). As indicated by this choice of language, the Court clearly seems to have contemplated some limiting principle. A citizen summoning the police to enforce the law ordinarily would not be considered to have engaged in a "conspiracy." Nor, presumably, would such a citizen be characterized as acting under color of law and thereby risking amenability to suit for constitutional violations that subsequently might occur. Surely there is nothing in *Adickes* to indicate that the Court would have found action under color of law in cases of this kind.

Although *Adickes* is distinguishable from these hypotheticals, the current case is not. The conduct in *Adickes* occurred in 1964, 10 years after *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and after the decade of publicized litigation that followed in its wake. In view of the intense national focus on issues of racial discrimination, it is virtually inconceivable that a private citizen then could have acted in the innocent belief that the state law and customs involved in *Adickes* still were presumptively valid. As Justice Harlan wrote, "[f]ew principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage segregation." 398 U. S., at 150–152. Construed as resting on this basis, *Adickes* establishes that a private

party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity. In such a context, the private party *could* be characterized as hiding behind the authority of law and as engaging in "joint participation" with the State in the deprivation of constitutional rights.[12] Here, however, petitioner has alleged no conspiracy. Nor has he even alleged that respondent was invoking the aid of a law he should have known to be constitutionally invalid.[13] Finally, there is no allegation that respondent's decision to invoke legal process was in any way

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[12] Arguing that the patent unconstitutionality of racial discrimination was irrelevant to the "conspiracy" count in *Adickes*, the Court charges that this discussion confuses the conspiracy and the substantive causes of action. *Ante*, at 932, n. 15. The Court's view is difficult to understand. In *Adickes* the private defendant allegedly conspired with the police to "deprive plaintiff of her right to enjoy equal treatment and service in a place of public accommodation," 398 U. S., at 150, n. 5, and apparently to cause her discriminatory and legally baseless arrest under a vagrancy statute. Because the vagrancy statute was not challenged as invalid on its face, the Court concludes that the "joint action" or "conspiracy" count "did not involve a state law, whether 'plainly unconstitutional' or not." *Ante*, at 932, n. 15. This conclusion is simply wrong. In the first place, the alleged "conspiracy" included an agreement to enforce a state law requiring racial segregation in restaurants. This law plainly was unconstitutional. Further, even the vagrancy statute certainly would have been unconstitutional as applied to enforce racial segregation. Presumably it was for these reasons that the Court agreed that the private defendant had "conspir[ed]" with the local police. 398 U. S., at 152. *Adickes* is entirely a different case from the one at bar.

[13] At least one scholarly commentator has stated a cautious conclusion that the Virginia attachment provisions would satisfy the standards established by this Court's recent due process decisions. See Brabham, Sniadach Through Di-Chem and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes, 12 U. Rich. L. Rev. 157, 195–199 (1977). The correctness of this conclusion is not of course an issue in the present posture of the case, nor is it directly relevant to the case's proper resolution.

compelled by the law or custom of the State in which he lived. In this context *Adickes* simply is inapposite.

Today's decision therefore is as unprecedented as it is unjust.[14]

[14] The Court suggests that respondent may be entitled to claim good-faith immunity from this suit for civil damages. *Ante*, at 942, n. 23. This is a positive suggestion with which I agree. A holding of immunity will mitigate the ultimate cost of this litigation. It would not, however, convert the Court's holding into a just one. This case already has been in litigation for nearly five years. It will now be remanded for further proceedings. Respondent, solely because he undertook to assert rights authorized by a presumptively valid state statute, will have been subjected to the expense, distractions, and hazards of a protracted litigation.

Syllabus

CLEMENTS, GOVERNOR OF TEXAS, ET AL. *v.* FASHING ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80–1290. Argued January 12, 1982—Decided June 25, 1982

Article III, § 19, of the Texas Constitution provides that "[n]o judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature." As interpreted by the Texas Supreme Court, § 19 requires an officeholder to complete his current term of office—if it overlaps the legislature's term—before he may be eligible to serve in the state legislature. Article XVI, § 65, provides that if holders of certain state and county offices whose unexpired term exceeds one year become candidates for any other state or federal office, this shall constitute an automatic resignation of the office then held. Appellees—who challenged these provisions in Federal District Court as violating the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution—included officeholders subject to § 65, each of whom alleged that he would have announced his candidacy for higher judicial office except that such announcement would constitute an automatic resignation from his current position, and one of whom (Baca), a Justice of the Peace, also alleged that he could not become a candidate for the state legislature because of § 19. The other appellees were voters who alleged that they would vote for the officeholder-appellees were they to become candidates. The District Court held that the challenged provisions denied appellees equal protection, and the Court of Appeals affirmed.

Held: The judgment is reversed.

631 F. 2d 731, reversed.

JUSTICE REHNQUIST delivered the opinion of the Court with respect to Parts I, II, and V, concluding that:

1. The uncontested allegations in the complaint are sufficient to create an actual case or controversy between the officeholder-appellees and those Texas officials charged with enforcing §§ 19 and 65. Pp. 961–962.

2. Sections 19 and 65 do not violate the First Amendment. The State's interests are sufficient to warrant the *de minimis* interference with appellees' First Amendment interests in candidacy. In addition,

appellees' First Amendment challenge as *elected* state officeholders contesting restrictions on partisan political activity must fail since §§ 19 and 65 represent a far more limited restriction on political activity than has been upheld with regard to *civil servants*. Cf. *CSC* v. *Letter Carriers*, 413 U. S. 548; *Broadrick* v. *Oklahoma*, 413 U. S. 601; *United Public Workers* v. *Mitchell*, 330 U. S. 75. Pp. 971–973.

JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR, concluded in Parts III and IV that neither of the challenged provisions of the Texas Constitution violates the Equal Protection Clause. Pp. 962–971.

(a) Candidacy is not a "fundamental right" that itself requires departure from traditional equal protection principles under which state-law classifications need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. In determining whether the provisions challenged here deserve "scrutiny" more vigorous than that which the traditional principles would require, the nature of the interests affected and the extent of the burden the challenged provisions place on the candidacy of current officeholders must be examined. Pp. 962–966.

(b) As applied to Baca, a Justice of the Peace whose term of office is four years whereas a state legislator's term is two years, § 19 simply requires that Baca must wait, at most, two years—one election cycle—before he may run as a candidate for the legislature. In establishing this maximum "waiting period," § 19 places a *de minimis* burden on the political aspirations of a current officeholder. This sort of insignificant interference with access to the ballot need only rest on a rational predicate in order to survive an equal protection challenge. Section 19 clearly rests on a rational predicate, since it furthers Texas' interests in maintaining the integrity of its Justices of the Peace by ensuring that they will neither abuse their position nor neglect their duties because of aspirations for higher office. Moreover, Texas has a legitimate interest in discouraging its Justices of the Peace from vacating their current terms of office, thereby avoiding the difficulties that accompany interim elections and appointments. Nor is § 19 invalid in that it burdens only those officeholders who desire to run for the legislature. It would be a perversion of the Equal Protection Clause to conclude that Texas must restrict a Justice of the Peace's candidacy for *all* offices before it can restrict his candidacy for *any* office. Pp. 966–970.

(c) The burdens imposed on candidacy by the automatic-resignation provision of § 65 are even less substantial than those imposed by § 19. Both provisions serve essentially the same state interests. Nor is § 65 invalid on the ground that it applies only to certain elected officials and not to others. Its history shows that the resignation provision was a creature of state electoral reforms, and a regulation is not devoid of a rational predicate simply because it happens to be incomplete. The Equal Protection Clause does not prohibit Texas from restricting one elected officeholder's candidacy for another elected office unless and until it places similar restrictions on other officeholders. Pp. 970–971.

REHNQUIST, J., announced the Court's judgment and delivered the opinion of the Court with respect to Parts I, II, and V, in which BURGER, C. J., and POWELL, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Parts III and IV, in which BURGER, C. J., and POWELL and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 973. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, and in Part I of which WHITE, J., joined, *post*, p. 976.

James P. Allison, Assistant Attorney General of Texas, argued the cause for appellants. With him on the brief were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, and *Richard E. Gray III*, Executive Assistant Attorney General.

Raymond C. Caballero argued the cause for appellees. With him on the brief was *John L. Fashing, pro se.**

JUSTICE REHNQUIST delivered the opinion of the Court with respect to Parts I, II, and V, and delivered an opinion with respect to Parts III and IV, in which THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR joined.

Appellees in this case challenge two provisions of the Texas Constitution that limit a public official's ability to become a candidate for another public office. The primary question in this appeal is whether these provisions violate the Equal Protection Clause of the Fourteenth Amendment.

**Gary A. Ahrens* filed a brief for the County Court at Law Judges Association of the State of Texas as *amicus curiae* urging affirmance.

I

Article III, § 19, of the Texas Constitution provides:

> "No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

Section 19 renders an officeholder ineligible for the Texas Legislature if his current term of office will not expire until after the legislative term to which he aspires begins. *Lee* v. *Daniels*, 377 S. W. 2d 618, 619 (Tex. 1964). Resignation is ineffective to avoid § 19 if the officeholder's current term of office overlaps the term of the legislature to which he seeks election. *Ibid.* In other words, § 19 requires an officeholder to complete his current term of office before he may be eligible to serve in the legislature.

Article XVI, § 65, is commonly referred to as a "resign-to-run" or "automatic resignation" provision. Section 65 covers a wide range of state and county offices.[1] It provides in relevant part:

> "[I]f any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held."

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[1] Section 65 covers District Clerks, County Clerks, County Judges, County Treasurers, Criminal District Attorneys, County Surveyors, Inspectors of Hides and Animals, County Commissioners, Justices of the Peace, Sheriffs, Assessors and Collectors of Taxes, District Attorneys, County Attorneys, Public Weighers, and Constables. Section 65 altered the terms of these offices. See *infra*, at 970.

Four of the appellees are officeholders subject to the automatic resignation provision of § 65. Fashing is a County Judge, Baca and McGhee are Justices of the Peace, and Ybarra is a Constable. Each officeholder-appellee alleged in the complaint that he is qualified under Texas law to be a candidate for higher judicial office, and that the reason he has not and will not announce his candidacy is that such an announcement will constitute an automatic resignation from his current position. Appellee Baca alleged in addition that he could not become a candidate for the legislature because of § 19. The remaining appellees are 20 voters who allege that they would vote for the officeholder-appellees were they to become candidates.

The District Court for the Western District of Texas held that § 19 and § 65 denied appellees equal protection. *Fashing* v. *Moore*, 489 F. Supp. 471 (1980). The District Court concluded that § 19 created "classifications that are invidiously discriminatory." *Id.*, at 475. The District Court explained that § 19 draws distinctions between those officials whose terms end concurrently with the beginning of the legislative term and those whose terms overlap the legislative term. The court also found § 19 deficient because "[n]o reciprocal prohibition . . . is placed upon a legislator seeking to run for mayor or judge." *Ibid.* As to § 65, the District Court determined that the classifications embodied in § 65 "fail[ed] to serve any proper governmental interest" because some state and local officials were covered by § 65 while others were not. The Court of Appeals for the Fifth Circuit affirmed without opinion. *Fashing* v. *Moore*, 631 F. 2d 731 (1980). We noted probable jurisdiction, 452 U. S. 904 (1981), and now reverse.

II

Before we may reach the merits of the constitutional issues in this case, we must address appellants' contention that the allegations in the complaint are insufficient to create a "case or controversy" between the officeholder-appellees and those Texas officials charged with enforcing § 19 and § 65. Appel-

lants contend that the dispute in this case is merely hypothetical and therefore not a justiciable controversy within the meaning of Art. III of the United States Constitution. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 90–91 (1947).

We find the uncontested allegations in the complaint sufficient to create an actual case or controversy. The officeholder-appellees have alleged that they have not and will not announce their candidacy for higher judicial office because such action will constitute an automatic resignation of their current offices pursuant to § 65. Unlike the situation in *Mitchell*, appellees have alleged in a precise manner that, but for the sanctions of the constitutional provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision. Given that § 65 provides for *automatic* resignation upon an announcement of candidacy, it cannot be said that § 65 presents only a speculative or hypothetical obstacle to appellees' candidacy for higher judicial office. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143, and n. 29 (1974); *Turner* v. *Fouche*, 396 U. S. 346, 361–362, n. 23 (1970).

Baca's uncontested allegations are sufficient to create a case or controversy with regard to § 19. That provision entirely disables an officeholder from becoming a candidate for the legislature until he completes his present term of office. The gist of Baca's challenge to § 19 is that it renders him ineligible to become a candidate for the legislature because his term as Justice of the Peace overlaps the legislative term. Baca's dispute with appellants over the constitutionality of § 19, therefore, cannot be said to be abstract or hypothetical, since he has sufficiently alleged that § 19 has prevented him from becoming a candidate for the legislature.

III

The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect

similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them. See, *e. g.*, *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 808–809 (1969); *McGowan* v. *Maryland*, 366 U. S. 420, 425–426 (1961). We have departed from traditional equal protection principles only when the challenged statute places burdens upon "suspect classes" of persons or on a constitutional right that is deemed to be "fundamental." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 17 (1973).

Thus, we must first determine whether the provisions challenged in this case deserve "scrutiny" more vigorous than that which the traditional principles would require.

Far from recognizing candidacy as a "fundamental right," we have held that the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." *Bullock* v. *Carter*, 405 U. S. 134, 143 (1972). "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Ibid.* In assessing challenges to state election laws that restrict access to the ballot, this Court has not formulated a "litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause." *Storer* v. *Brown*, 415 U. S. 724, 730 (1974). Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. *Ibid.*; *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968).

Our ballot access cases, however, do focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the "availability of political opportunity." *Lubin* v. *Panish*, 415 U. S. 709, 716 (1974). This Court has departed from traditional equal protection analysis in recent years in two essentially separate, although similar, lines of ballot access cases.

One line of ballot access cases involves classifications based on wealth.[2] In invalidating candidate filing-fee provisions, for example, we have departed from traditional equal protection analysis because such a "system falls with unequal weight on voters, as well as candidates, according to their economic status." *Bullock* v. *Carter*, *supra*, at 144. "Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candidates without regard to their economic status." *Lubin* v. *Panish*, *supra*, at 717–718. Economic status is not a measure of a prospective candidate's qualifications to hold elective office, and a filing fee alone is an inadequate test of whether a candidacy is serious or spurious. Clearly, the challenged provisions in the instant case involve neither filing fees nor restrictions that invidiously burden those of lower economic status. This line of cases, therefore, does not support a departure from the traditional equal protection principles.

The second line of ballot access cases involves classification schemes that impose burdens on new or small political parties or independent candidates. See, *e. g.*, *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173 (1979); *Storer* v. *Brown*, *supra*; *American Party of Texas* v. *White*, 415 U. S. 767 (1974); *Jenness* v. *Fortson*, 403 U. S. 431 (1971); *Williams* v. *Rhodes*, *supra*. These cases involve requirements

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[2] *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Lubin* v. *Panish*, 415 U. S. 709 (1974).

that an independent candidate or minor party demonstrate a certain level of support among the electorate before the minor party or candidate may obtain a place on the ballot. In these cases, the Court has emphasized that the States have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections. To this end, the Court has upheld reasonable level-of-support requirements and classifications that turn on the political party's success in prior elections. See *Storer* v. *Brown, supra; American Party of Texas* v. *White, supra; Jenness* v. *Fortson, supra*. The Court has recognized, however, that such requirements may burden First Amendment interests in ensuring freedom of association, as these requirements classify on the basis of a candidate's association with particular political parties. Consequently, the State may not act to maintain the "status quo" by making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates. See *Williams* v. *Rhodes, supra*, at 25.

The provisions of the Texas Constitution challenged in this case do not contain any classification that imposes special burdens on minority political parties or independent candidates. The burdens placed on those candidates subject to § 19 and § 65 in no way depend upon political affiliation or political viewpoint.

It does not automatically follow, of course, that we must apply traditional equal protection principles in examining § 19 and § 65 merely because these restrictions on candidacy do not fall into the two patterns just described. But this fact does counsel against discarding traditional principles without first examining the nature of the interests that are affected and the extent of the burden these provisions place on candidacy. See *Bullock* v. *Carter, supra*, at 143; *Storer* v. *Brown, supra*, at 730. Not all ballot access restrictions

require "heightened" equal protection scrutiny. The Court, for example, applied traditional equal protection principles to uphold a classification scheme that denied absentee ballots to inmates in jail awaiting trial. *McDonald* v. *Board of Election Comm'rs*, 394 U. S., at 807–811. Thus, it is necessary to examine the provisions in question in terms of the extent of the burdens that they place on the candidacy of current holders of public office.

IV

A

Section 19 applies only to candidacy for the Texas Legislature. Of the appellees, only Baca, a Justice of the Peace, alleged that he would run for the Texas Legislature. Of the plaintiffs in this case, only appellee Baca's candidacy for another public office has in any fashion been restricted by § 19. The issue in this case, therefore, is whether § 19 may be applied to a Justice of the Peace in a manner consistent with the Equal Protection Clause.[3]

Section 19 merely prohibits officeholders from cutting short their current term of office in order to serve in the legislature. In Texas, the term of office for a Justice of the Peace is four years, while legislative elections are held every

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[3] A litigant has standing to challenge the constitutionality of a statute only insofar as it adversely affects his own rights. *Ulster County Court* v. *Allen*, 442 U. S. 140, 154–155 (1979). "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (1973). Therefore, Baca may not argue that § 19 may not be applied to restrict a Justice of the Peace's candidacy for the legislature because the State's interests in restricting candidacy by a different class of officeholders are insufficient to survive constitutional scrutiny. See *Storer* v. *Brown*, 415 U. S. 724, 737 (1974). Cf. *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 442 (1982).

two years. See Tex. Const., Art. V, § 18; Art. III, §§ 3, 4. Therefore, § 19 simply requires Baca to complete his 4-year term as Justice of the Peace before he may be eligible for the legislature. At most, therefore, Baca must wait two years—one election cycle—before he may run as a candidate for the legislature.[4]

In making an equal protection challenge, it is the claimant's burden to "demonstrate in the first instance a discrimination against [him] of some substance." *American Party of Texas* v. *White*, 415 U. S., at 781. Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955).

In establishing a maximum "waiting period" of two years for candidacy by a Justice of the Peace for the legislature, § 19 places a *de minimis* burden on the political aspirations of a *current* officeholder. Section 19 discriminates neither on the basis of political affiliation nor on any factor not related to a candidate's qualifications to hold political office. Unlike filing fees or the level-of-support requirements, § 19 in no way burdens access to the political process by those who are outside the "mainstream" of political life. In this case, § 19 burdens only a candidate who has successfully been elected to one office, but whose political ambitions lead him to pursue a seat in the Texas Legislature.

A "waiting period" is hardly a significant barrier to candidacy. In *Storer* v. *Brown*, 415 U. S., at 733–737, we upheld a statute that imposed a flat disqualification upon any candidate seeking to run in a party primary if he had been registered or affiliated with another political party within the 12 months preceding his declaration of candidacy. Similarly, we upheld a 7-year durational residency requirement for can-

[4] In the case of local elected officials whose terms of office typically end in nonelection years, the "waiting period" of § 19 is even shorter.

didacy in *Chimento* v. *Stark*, 414 U. S. 802 (1973), summarily aff'g 353 F. Supp. 1211 (NH). We conclude that this sort of insignificant interference with access to the ballot need only rest on a rational predicate in order to survive a challenge under the Equal Protection Clause. See *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U. S., at 189 (STEVENS, J., concurring in part and in judgment).

Section 19 clearly rests on a rational predicate. That provision furthers Texas' interests in maintaining the integrity of the State's Justices of the Peace.[5] By prohibiting candidacy for the legislature until completion of one's term of office, § 19 seeks to ensure that a Justice of the Peace will neither abuse his position nor neglect his duties because of his aspirations for higher office. The demands of a political campaign may tempt a Justice of the Peace to devote less than his full time and energies to the responsibilities of his office. A campaigning Justice of the Peace might be tempted to render decisions and take actions that might serve more to further his political ambitions than the responsibilities of his office. The State's interests are especially important with regard to judicial officers. It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents.

Texas has a legitimate interest in discouraging its Justices of the Peace from vacating their current terms of office. By requiring Justices of the Peace to complete their current terms of office, the State has eliminated one incentive to vacate one's office prior to the expiration of the term. The State may act to avoid the difficulties that accompany interim elections and appointments. "[T]he Constitution does not require the State to choose ineffectual means to achieve its

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[5] The State's particular interest in maintaining the integrity of the judicial system could support § 19, even if such a restriction could not survive constitutional scrutiny with regard to any other officeholder. See n. 3, *supra*.

aims." *Storer* v. *Brown, supra,* at 736. Under traditional equal protection principles, a classification is not deficient simply because the State could have selected another means of achieving the desired ends. *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 316 (1976); *Mathews* v. *Diaz,* 426 U. S. 67, 83 (1976); *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S., at 51.

Finally, it is no argument that § 19 is invalid because it burdens only those officeholders who desire to run for the legislature. In *Broadrick* v. *Oklahoma,* 413 U. S. 601, 607, n. 5 (1973), we rejected the contention that Oklahoma's restrictions on political activity by public employees violated the Equal Protection Clause:

> "Appellants also claim that § 818 violates the Equal Protection Clause of the Fourteenth Amendment by singling out classified service employees for restrictions on partisan political expression while leaving unclassified personnel free from such restrictions. The contention is somewhat odd in the context of appellants' principal claim, which is that § 818 reaches too far rather than not far enough. In any event, the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. See *McGowan* v. *Maryland,* 366 U. S. 420 (1961). And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed."

It would indeed be a perversion of the Equal Protection Clause were we to conclude that Texas must restrict a Justice of the Peace's candidacy for *all* offices before it can restrict a Justice of the Peace's candidacy for *any* office.

The Equal Protection Clause allows the State to regulate "one step at a time, addressing itself to the phase of the problem which seems most acute." *Williamson* v. *Lee Optical Co.,* 348 U. S., at 489. The State "need not run the risk

of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." *McDonald* v. *Board of Election Comm'rs*, 394 U. S., at 809 (citation omitted).

B

Article XVI, § 65, of the Texas Constitution provides that the holders of certain offices automatically resign their positions if they become candidates for any other elected office, unless the unexpired portion of the current term is one year or less. The burdens that § 65 imposes on candidacy are even less substantial than those imposed by § 19. The two provisions, of course, serve essentially the same state interests. The District Court found § 65 deficient, however, not because of the nature or extent of the provision's restriction on candidacy, but because of the manner in which the offices are classified. According to the District Court, the classification system cannot survive equal protection scrutiny because Texas has failed to explain sufficiently why some elected public officials are subject to § 65 and why others are not. As with the case of § 19, we conclude that § 65 survives a challenge under the Equal Protection Clause unless appellees can show that there is no rational predicate to the classification scheme.

The history behind § 65 shows that it may be upheld consistent with the "one step at a time" approach that this Court has undertaken with regard to state regulation not subject to more vigorous scrutiny than that sanctioned by the traditional principles. Section 65 was enacted in 1954 as a transitional provision applying only to the 1954 election. 2 G. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 812 (1977). Section 65 extended the terms of those offices enumerated in the provision from two to four years. The provision also staggered the terms of other offices so that at least some county and local offices would be contested at each election. *Ibid.* The auto-

matic resignation proviso to § 65 was not added until 1958. In that year, a similar automatic resignation provision was added in Art. XI, § 11, which applies to officeholders in home rule cities who serve terms longer than two years. Section 11 allows home rule cities the option of extending the terms of municipal offices from two to up to four years.

Thus, the automatic resignation provision in Texas is a creature of the State's electoral reforms of 1958. That the State did not go further in applying the automatic resignation provision to those officeholders whose terms were not extended by § 11 or § 65, absent an invidious purpose, is not the sort of malfunctioning of the State's lawmaking process forbidden by the Equal Protection Clause. See *McDonald* v. *Board of Election Comm'rs*, *supra*, at 809. A regulation is not devoid of a rational predicate simply because it happens to be incomplete. See *Williamson* v. *Lee Optical Co.*, *supra*, at 489. The Equal Protection Clause does not forbid Texas to restrict one elected officeholder's candidacy for another elected office unless and until it places similar restrictions on other officeholders. *Broadrick* v. *Oklahoma*, 413 U. S., at 607, n. 5. Cf. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 466 (1981). The provision's language and its history belie any notion that § 65 serves the invidious purpose of denying access to the political process to identifiable classes of potential candidates.

V

As an alternative ground to support the judgments of the courts below, appellees contend that § 19 and § 65 violate the First Amendment. Our analysis of appellees' challenge under the Equal Protection Clause disposes of this argument. We have concluded that the burden on appellees' First Amendment interests in candidacy are so insignificant that the classifications of § 19 and § 65 may be upheld consistent with traditional equal protection principles. The State's interests in this regard are sufficient to warrant the *de*

minimis interference with appellees' interests in candidacy.[6]

There is another reason why appellees' First Amendment challenge must fail. Appellees are *elected* state officeholders who contest restrictions on partisan political activity. Section 19 and § 65 represent a far more limited restriction on political activity than this Court has upheld with regard to *civil servants*. See *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973); *Broadrick* v. *Oklahoma*, *supra*; *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947). These provisions in no way restrict appellees' ability to participate in the political campaigns of third parties. They limit neither political contributions nor expenditures. They do not preclude appellees from holding an office in a political party. Consistent with § 19 and § 65, appellees may distribute campaign literature and may make speeches on behalf of a candidate.

In this case, § 19 operates merely to require appellee Baca to await the conclusion of his 4-year term as Justice of the Peace before he may run for the Texas Legislature. By virtue of § 65, appellees in this case will automatically resign their current offices if they announce their candidacy for higher judicial office so long as the unexpired term of their current office exceeds one year. In this sense, § 19 and § 65 are in reality no different than the provisions we upheld in *Mitchell*, *Letter Carriers*, and *Broadrick*, which required dismissal of any civil servant who became a political candidate. See 413 U. S., at 556; 413 U. S., at 617.

Neither the Equal Protection Clause nor the First Amendment authorizes this Court to review in cases such as this the manner in which a State has decided to govern itself. Constitutional limitations arise only if the classification scheme is

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[6] Baca may not utilize the "overbreadth" doctrine to challenge § 19. Baca may not challenge the provision's application to him on the grounds that the provision might be unconstitutional as applied to a class of officeholders not before the Court. *Broadrick* v. *Oklahoma*, 413 U. S., at 612–616. The First Amendment will not suffer if the constitutionality of § 19 is litigated on a case-by-case basis.

invidious or if the challenged provision significantly impairs interests protected by the First Amendment. Our view of the wisdom of a state constitutional provision may not color our task of constitutional adjudication.

The judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

In cases presenting issues under the Equal Protection Clause, the Court often plunges directly into a discussion of the "level of scrutiny" that will be used to review state action that affects different classes of persons differently. Unfortunately that analysis may do more to obfuscate than to clarify the inquiry. This case suggests that a better starting point may be a careful identification of the character of the federal interest in equality that is implicated by the State's discriminatory classification. In my opinion, the disparate treatment in this case is not inconsistent with any federal interest that is protected by the Equal Protection Clause. With respect to the state action at issue, there is no federal requirement that the different classes be treated as though they were the same.

It is first helpful to put to one side the claim that the burdens imposed on certain Texas officeholders are inconsistent with the First Amendment. I am satisfied that the State's interest in having its officeholders faithfully perform the public responsibilities they have voluntarily undertaken is adequate to justify the restrictions placed on their ability to run for other offices. Nor is the First Amendment violated by the fact that the restrictions do not apply equally to all offices; while that Amendment requires a State's treatment of speech to be evenhanded, there is no suggestion here that the State's classification of offices operates to promote a certain viewpoint at the expense of another. The federal constitutional inquiry thus is limited to the question whether the

State's classification offends any interest in equality that is protected by the Equal Protection Clause.

In considering that question, certain preliminary observations are important. The complaining officeholders do not object to the fact that they are treated differently from members of the general public.[1] The only complaint is that certain officeholders are treated differently from other officeholders. Moreover, appellees do not claim that the classes are treated differently because of any characteristic of the persons who happen to occupy the various offices at any particular time or of the persons whom those officeholders serve; there is no suggestion that the attributes of the offices have been defined to conceal an intent to discriminate on the basis of personal characteristics or to provide governmental services of differing quality to different segments of the community. In this case, the disparate treatment of different officeholders is entirely a function of the different offices that they occupy.

The question presented then is whether there is any federal interest in requiring a State to define the benefits and burdens of different elective state offices in any particular manner. In my opinion there is not. As far as the Equal Protection Clause is concerned, a State may decide to pay a justice of the peace a higher salary than a Supreme Court justice. It may require game wardens to work longer hours than park rangers. It may require meat inspectors to wear uniforms without requiring building inspectors to do so. In addition, I see no reason why a State may not provide that certain offices will be filled on a part-time basis and that others will be filled by persons who may not seek other office until they have fulfilled their duties in the first. There may be no explanation for these classifications that a federal judge

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[1] The fact that appellees hold state office is sufficient to justify a restriction on their ability to run for other office that is not imposed on the public generally.

would find to be "rational." But they do not violate the Equal Protection Clause because there is no federal requirement that a State fit the emoluments or the burdens of different elective state offices into any particular pattern.[2] The reason, then, that appellees may be treated differently from other officeholders is that they occupy different offices. Cf. *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 189 (STEVENS, J., concurring in part and in judgment).[3]

As in so many areas of the law, it is important to consider each case individually. In the situation presented, however, I believe that there is no federal interest in equality that requires the State of Texas to treat the different classes as though they were the same.[4] This reasoning brings me to the same conclusion that JUSTICE REHNQUIST has reached. It avoids, however, the danger of confusing two quite differ-

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[2] The Federal Constitution does, of course, impose significant constraints on a state government's employment practices. For example, the First Amendment limits the State's power to discharge employees who make controversial speeches. *Pickering* v. *Board of Education*, 391 U. S. 563. The Due Process Clause affords procedural safeguards to tenured employees. *Board of Regents* v. *Roth*, 408 U. S. 564. The Equal Protection Clause prohibits the State from classifying applicants for employment in an arbitrary manner. *Sugarman* v. *Dougall*, 413 U. S. 634. I find no comparable federal interest, however, in this case.

[3] In *Vance* v. *Bradley*, 440 U. S. 93, the Court held that a statutory classification that treated employees of the Foreign Service differently from employees of the Civil Service did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. In my view, such a classification—without more—could not violate equal protection requirements.

[4] In defining the interests in equality protected by the Equal Protection Clause, one cannot ignore the State's legitimate interest in structuring its own form of government. The Equal Protection Clause certainly was not intended to require the States to justify every decision concerning the terms and conditions of state employment according to some federal standard.

ent questions.[5] JUSTICE REHNQUIST has demonstrated that there is a "rational basis" for imposing the burdens at issue on the offices covered by §§ 19 and 65. He has not, however, adequately explained the reasons, if any, for imposing those burdens on some offices but not others. With respect to the latter inquiry, the plurality is satisfied to note that the State may approach its goals "one step at a time." *Ante*, at 969, 970. In my judgment, this response is simply another way of stating that there need be no justification at all for treating two classes differently during the interval between the first step and the second step—an interval that, of course, may well last forever. Although such an approach is unobjectionable in a case involving the differences between different public offices, I surely could not subscribe to JUSTICE REHNQUIST's formulation of the standard to be used in evaluating state legislation that treats different classes of persons differently.[6] Accordingly, while I join the Court's judgment, I join only Parts I, II, and V of JUSTICE REHNQUIST's opinion.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, and with whom JUSTICE WHITE joins as to Part I, dissenting.

In rejecting appellees' equal protection challenge on the basis that the State is proceeding "one step at a time," the plurality today gives new meaning to the term "legal fic-

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[5] See Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982). Professor Westen's article is valuable because it illustrates the distinction between concern with the substantive import of a state restriction and concern with any disparate impact that it may produce. In recognizing that distinction, however, it is important not to lose sight of the fact that the Equal Protection Clause has independent significance in protecting the federal interest in requiring States to govern impartially.

[6] The plurality frames the test that should ordinarily be applied in this way: "Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Ante*, at 963.

tion."[1] The Court's summary dismissal of appellees' First Amendment claim vastly oversimplifies the delicate accommodations that must be made between the interests of the State as employer and the constitutionally protected rights of state employees. I dissent.

I

Putting to one side the question of the proper level of equal protection scrutiny to be applied to these restrictions on candidacy for public office,[2] I find it clear that no genuine justifi-

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[1] I note that a majority of the Court today rejects the plurality's mode of equal protection analysis. See *ante*, at 976 (STEVENS, J., concurring in part and in judgment).

[2] It is worth noting, however, that the plurality's analysis of the level of scrutiny to be applied to these restrictions gives too little consideration to the impact of our prior cases. Although we have never defined candidacy as a fundamental right, we have clearly recognized that restrictions on candidacy impinge on First Amendment rights of candidates and voters. See, *e. g.*, *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 184 (1979); *Lubin* v. *Panish*, 415 U. S. 709, 716 (1974); *American Party of Texas* v. *White*, 415 U. S. 767 (1974); *Bullock* v. *Carter*, 405 U. S. 134, 142–143 (1972); *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968). With this consideration in mind, we have applied strict scrutiny in reviewing most restrictions on ballot access; thus we have required the State to justify any discrimination with respect to candidacy with a showing that the differential treatment is "necessary to further compelling state interests." *American Party of Texas* v. *White*, *supra*, at 780. See also *Bullock* v. *Carter*, *supra*, at 144. The plurality dismisses our prior cases as dealing with only two kinds of ballot access restrictions—classifications based on wealth and classifications imposing burdens on new or small political parties or independent candidates. *Ante*, at 964–965. But strict scrutiny was required in those cases because of their impact on the First Amendment *rights* of candidates and voters, see *Storer* v. *Brown*, 415 U. S. 724, 729 (1974), not because the *class* of candidates or voters that was burdened was somehow suspect. Compare *Lubin* v. *Panish*, 415 U. S., at 717–718, with *id.*, at 719 (Douglas, J., concurring) (strict scrutiny demanded because classification based on wealth). The plurality offers no explanation as to why the restrictions at issue here, which completely bar some candidates from running and require other candidates to give up their present employment, are

cation exists that might support the classifications embodied in either Art. III, § 19, or Art. XVI, § 65.

The State seeks to justify both provisions on the basis of its interest in discouraging abuse of office and neglect of duties by current officeholders campaigning for higher office during their terms. The plurality posits an additional justification not asserted by the State for § 19: That section also discourages certain officeholders "from vacating their current terms of office." *Ante*, at 968. But neither the State nor the plurality offers any justification for *differential* treatment of various classes of officeholders, and the search for such justification makes clear that the classifications embodied in these provisions lack any meaningful relationship to the State's asserted or supposed interests.

Article III, § 19, provides:

> "No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this state, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

And the Texas Election Code provides that persons ineligible to hold an office shall not be permitted to campaign for that office. Tex. Rev. Civ. Stat. Ann., Arts. 1.05, 1.06 (Vernon Supp. 1982). Article III, § 19, creates, in effect, two classes of officeholders. Officeholders of state, federal, and even foreign offices seeking Texas *legislative* office whose terms overlap with the legislative term are barred from campaign-

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less "substantial" in their impact on candidates and their supporters than, for example, the $700 filing fee at issue in *Lubin*.

In my view, some greater deference may be due the State because these restrictions affect only public employees, see Part II, *infra*, but this does not suggest that, in subjecting these classifications to equal protection scrutiny, we should completely disregard the vital interests of the candidates and the citizens who they represent in a political campaign.

ing during their terms, and even after they have resigned, see n. 4, *infra;* those officeholders seeking any other office and those officeholders whose terms do not overlap the legislative term are free to launch campaigns from their current offices, even while they still hold office.

What relationship does the plurality find between the burden placed on the class of all state, federal, and foreign officeholders seeking legislative seats and the asserted state interests? If it faced the question, the plurality would of course have to acknowledge that Texas has no interest in protecting, for example, federal officials—particularly those serving the electorate of another State—from the corrupting influence of a state legislative campaign. The only conceivable state interest in barring these candidacies would be the purely impermissible one of protecting Texas legislative seats against outside competition. But the plurality does not address this question or purport to find any justification for the broad reach of § 19. Instead it defines the equal protection challenge to § 19 as "whether § 19 may be applied to a [Texas] Justice of the Peace," *ante*, at 966, and acknowledges that § 19 would not necessarily survive constitutional scrutiny with regard to any other officeholder, *ante*, at 968, n. 5. The *plurality* defines the question in this manner because Baca, the appellee challenging this provision, is a Justice of the Peace. But the *State* has defined the class of persons restricted by § 19 as all persons "holding a lucrative office under the United States, or [Texas], or any foreign government." And it has always been my understanding that "'[e]qual protection' . . . emphasizes disparity in treatment by a State between classes of individuals," in contrast to "'[d]ue process'," which "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Ross* v. *Moffitt*, 417 U. S. 600, 609 (1974). Accordingly, our equal protection cases have always assessed the legislative purpose in light of the class as the legislature has drawn it, rather than on the basis

of some judicially drawn subclass for which it is possible to posit some legitimate purpose for discriminatory treatment. See, *e. g.*, *Lubin* v. *Panish*, 415 U. S. 709, 717–718 (1974).[3] When the class of persons burdened by § 19, as the State has drawn it, is viewed in light of the asserted purposes of discouraging abuse of office and neglect of duty, it is beyond dispute that the class is substantially overbroad.

The plurality cannot, in the same manner that it avoids the overbreadth of the class, avoid the irrationality in the fact that § 19 applies *only* to candidacy for the Texas Legislature. Officeholders are free to run for President, the United States Senate, governor, mayor, city council, and many other offices. The distracting and corrupting effects of campaigning are obviously present in *all* campaigns, not only those for the legislature. The plurality responds to this characteristic of the legislative scheme by stating that "[t]he Equal Protection Clause allows the State to regulate 'one step at a time . . . .'" *Ante*, at 969, quoting *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). But the record in this case belies any assertion by the State that it is proceeding "one step at a time." Article III, § 19, has existed in its present form since 1876. There is no legislative history to explain its intended purpose or to suggest that it is part of a larger, more equitable regulatory scheme.[4] And in the 106 years that

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[3] The plurality's sudden focus on the fairness of the restriction to the individual as opposed to the class, is as episodic as it is novel. For in writing for the Court in *Weinberger* v. *Salfi*, 422 U. S. 749, 781 (1975), JUSTICE REHNQUIST refused to hold that an otherwise valid legislative classification should be *invalidated* on the basis of the characteristics of the individual plaintiff.

[4] Indeed, it may be that Art. III, § 19, was intended to do no more than prohibit dual officeholding. If it had been so construed, there would be no equal protection problem for there are blanket prohibitions in Texas against holding two elected offices at the same time. See Art. II, § 1; Art. XVI, § 40. In *Lee* v. *Daniels*, 377 S. W. 2d 618 (1964), the Texas Supreme Court construed the language in § 19, "during the term for which he was elected or appointed," to mean that even after an otherwise qualified candi-

have passed since § 19's adoption, the Texas Legislature has adopted no comparable bar to candidacy for other offices.

A state legislature may implement a program step by step, and an underinclusive regulation may be upheld where the record demonstrates that such "one step at a time" regulation is in fact being undertaken. See, *e. g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 465–466 (1981); *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 809–811 (1969). I cannot subscribe, however, to the plurality's wholly fictional one-step-at-a-time justification. As JUSTICE STEVENS points out in his concurrence, the plurality's one-step-at-a-time response in this case "is simply another way of stating that there need be no justification at all for treating two classes differently during the interval between the first step and the second step—an interval that, of course, may well last forever." *Ante*, at 976.

Section 19's haphazard reach and isolated existence strikes me as the very sort of "arbitrary scheme or plan" that we distinguished from an as-yet-uncompleted design in *McDonald* v. *Board of Election Comm'rs*, *supra*, at 811, a case the plurality relies on to support the classification in this case, see *ante*, at 971. In *McDonald* the record demonstrated that in providing absentee ballots to certain classes of persons the State was in fact proceeding step by step. The State had demonstrated "a consistent and laudable state policy of add-

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date for the legislature had resigned his current position, he could not hold legislative office. The dissent in *Lee* argued that § 19 was simply a prohibition on dual officeholding and the phrase, "during the term for which he is elected or appointed," simply "negates any basis for the contention that a person" who once held one of the offices covered by the section was still ineligible for the legislature after the completion of his term. *Id.*, at 621 (Steakley, J., dissenting). The Texas Supreme Court was unaided by any legislative history on this provision. We are of course bound by the state court's construction of this state provision, but I point out its ambiguity to highlight the dubious nature of the plurality's hypothesis that Art. III, § 19, marks one step in what will become more complete regulation of a perceived evil.

ing, over a 50-year period, groups to the absentee coverage as their existence comes to the attention of the legislature." 394 U. S., at 811. Article III, § 19, stands in stark contrast to the provision reviewed in *McDonald*. In this case, it is pure fiction for the plurality to declare that § 19 is one step in a broader and more equitable scheme that due to legislative delay and inadvertence is yet to be completed.

Appellants, unlike the plurality, at least attempt to justify the distinction between legislative campaigns and other campaigns. They argue that an officeholder-candidate will not enforce *legislative* policy if he or she is campaigning for a legislative seat. Brief for Appellants 9. But this attempted justification is unpersuasive. Appellants' argument apparently rests on the tenuous premise that a candidate is likely to choose the strategy of undermining the program of an incumbent opponent in order to advance his own prospects. It is plain that whatever force there is to this premise cannot be limited to a candidate for the legislature; it may as logically be argued that a judge will further his ambition for higher judicial office by failing to follow judicial decisions of a higher court, or that a state legislator with gubernatorial aspirations will use his present position to sabotage the program of the present administration. Even assuming that the State has a particular interest in protecting state *legislative* policy, and accepting appellants' somewhat dubious premise, it is still apparent to me that this asserted purpose is ill-served by the group of officeholders covered by § 19. Only those officeholders whose terms happen to *overlap* with the legislative term are prohibited from running for the legislature.[5] The

[5] For example, in *Lee* v. *Daniels*, *supra*, a County Commissioner resigned on February 1, 1964, and he sought thereafter to run for the legislature. However, his term did not expire until December 31, 1964; the legislative term commenced in November 1964, and the court therefore held that his name could not be placed on the legislative ballot. In contrast, in *Chapa* v. *Whittle*, 536 S. W. 2d 681 (Tex. Civ. App. 1976), the Director of a Social Culture Intervention Program began campaigning in February 1966. He resigned from his current office in May of that year. Because the Di-

District Court noted that this prohibition is most likely to bar the candidacy of mayors and city councilmen—persons who have little if anything to do with carrying out state legislative policy. *Fashing* v. *Moore*, 489 F. Supp. 471, 475 (WD Tex. 1980). Appointed administrators, District Attorneys, and District Judges—to name just a few—whose terms do not overlap with that of the legislature, but who are directly charged with carrying out legislative policy, are left free to campaign for the legislature while remaining in office. See, *e. g.*, *Chapa* v. *Whittle*, 536 S. W. 2d 681 (Tex. Civ. App. 1976). It is thus clear that the prohibition on legislative campaigns in § 19 furthers in no substantial way the State's asserted interest in fidelity to legislative policy. In short, I can discern neither in the appellants' argument nor in the plurality's hypothesis any rational basis for the discriminatory burden placed upon this class of potential candidates.

I turn now to Art. XVI, § 65. That section applies only to persons holding any of approximately 16 enumerated offices.[6] With respect to persons holding these offices, Art. XVI, § 65, provides:

> "[I]f any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed

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rector had no set term, the complainant could not show that the Director's term overlapped the legislative term, beginning in November 1966, and the court therefore allowed the Director to run for the legislature.

[6]The assortment of offices restricted by Art. XVI, § 65, are: District Clerks; County Clerks; various County Judges; County Treasurers; Criminal District Attorneys; County Surveyors; Inspectors of Hides and Animals; County Commissioners; Justices of the Peace; Sheriffs; Assessors and Collectors of Taxes; District Attorneys; County Attorneys; Public Weighers; and Constables.

> one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held . . . ."

Other officeholders, performing similar if not identical duties, are not within the reach of this or any similar restriction and are thus free to campaign for one office while holding another. Article XVI, § 65, while lacking § 19's broad sweep into areas completely beyond the purview of the State's concerns, restricts the candidacy only of an unexplained and seemingly inexplicable collection of administrative, executive, and judicial officials. The only distinguishing features of the officeholders collected in § 65 is that in 1954 their terms of office were increased from two to four years, and they all happen to be precinct, county, and district officials as opposed to members of the legislature or statewide elected officials. See 2 G. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 813 (1977). Neither appellants nor the plurality offer any explanation why the State has a greater interest in having the undivided attention of a "Public Weigher" than of a state criminal court judge, or any reason why the State has a greater interest in preventing the abuse of office by an "Inspector of Hides and Animals," than by a justice of the Texas Supreme Court. Yet in each instance § 65 applies to the former office and not to the latter. Again the plurality opines that the State is legislating "one step at a time." But while Art. XVI, § 65, is of more recent vintage than Art. III, § 19, it has been part of the Texas Constitution for 24 years without prompting any corresponding rule applicable to holders of statewide office. Thus § 65, like § 19, cannot in any realistic sense be upheld as one step in an evolving scheme.

In short, in my view, neither Art. III, § 19, nor Art. XVI, § 65, can survive even minimal equal protection scrutiny.[7]

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[7] JUSTICE STEVENS argues in his concurrence that there is no federal interest in requiring the State to treat different elective state offices in a

II

I also believe that Art. III, § 19, violates the First Amendment. The Court dismisses this contention by stating that this provision is a more limited restriction on political activities of public employees than we have upheld in prior cases. But none of our precedents presented a restriction on campaigning that applied even *after* an official had resigned from public office or to officials who did not serve in the regulating government. Moreover, the Court does not go on to address what is for me the crucial question: What justification does the State have for this restriction and how does this provision address the State's asserted interests?

The Court acknowledges that Art. III, § 19, restrains government employees' pursuit of political office. Such pursuit is clearly protected by the First Amendment and restrictions on it must be justified by the State's interest in ensuring the continued proper performance of current public duties. As the Court notes, similar competing considerations were considered in *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973), *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), and *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947).

In *United Public Workers*, the Court upheld § 9(a) of the Hatch Act, 5 U. S. C. § 7324(a)(2), which prohibits certain federal civil service employees from taking "an active part in political management or political campaigns." In *Letter Car-*

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fair and equitable manner. *Ante*, at 974. I agree with JUSTICE STEVENS that the State may define *many* of the "benefits and burdens of different elective state offices" in a dissimilar manner without offering an explanation for the classifications that a federal judge will find to be rational, so long as such classifications do not mask any racial or otherwise impermissible discrimination. *Ibid.* But where the differential treatment concerns a restriction on the right to seek public office—a right protected by the First Amendment—that Amendment supplies the federal interest in equality that may be lacking where the State is simply determining salary, hours, or working conditions of its own employees.

riers the Court reaffirmed *United Public Workers*, and in *Broadrick* the Court upheld a similar state provision. In these cases, the Court determined that the restrictions were necessary to foster and protect efficient and effective government by keeping partisan politics out of the civil service. The Court recognized that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Letter Carriers*, *supra*, at 564, quoting *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968).

At the same time, this Court has unequivocally rejected the premise that one surrenders the protection of the First Amendment by accepting the responsibilities of public employment. *Elrod* v. *Burns*, 427 U. S. 347 (1976); *Pickering* v. *Board of Education*, *supra*. And the Court has clearly recognized that restrictions on candidacy impinge on First Amendment rights. See, *e. g.*, *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173 (1979); *Lubin* v. *Panish*, 415 U. S. 709 (1974); *American Party of Texas* v. *White*, 415 U. S. 767 (1974); *Bullock* v. *Carter*, 405 U. S. 134, 142–143 (1972); *Williams* v. *Rhodes*, 393 U. S. 23, 34 (1968).[8] Our precedents establish the guiding principle for applying the strictures of the First Amendment to restrictions of expressional conduct of state employees: The Court must arrive at an accommodation "'between the interests of the [employee]

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[8] Such restrictions affect not only the expressional and associational rights of candidates, but those of voters as well. Voters generally assert their views on public issues by casting their ballots for the candidate of their choice. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S., at 184. The effect on voters from restrictions on candidacy is illustrated in this case by the fact that 20 of the appellees are voters who allege that they would vote for the officeholder-appellees were they to become candidates. See *ante*, at 961.

. . . and the interest of the [government], as an employer.'" *CSC* v. *Letter Carriers*, *supra*, at 564, quoting *Pickering* v. *Board of Education*, *supra*, at 568. And in striking the required balance, "[t]he gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights." *Elrod* v. *Burns*, *supra*, at 362 (plurality opinion). See also *United Public Workers* v. *Mitchell*, *supra*, at 96.[9]

In undertaking this balance, I acknowledge, of course, that the State has a vital interest in ensuring that public officeholders perform their duties properly, and that a State requires substantial flexibility to develop both direct and indirect methods of serving that interest. But if the State's interest is not substantially furthered by the challenged restrictions, then the restrictions are an unnecessary intrusion into employee rights. If the restriction is effective, but interferes with protected activity more than is reasonably necessary to further the asserted state interest, then the overintrusive aspects of the restriction lack constitutional justification. In short, to survive scrutiny under the First Amendment, a restriction on political campaigning by government employees must be narrowly tailored and substantially related to furthering the State's asserted interests.

It is clear to me that Art. III, § 19, is not narrowly tailored to conform to the State's asserted interests. Nor does it further those interests in a meaningful way. I have discussed briefly the broad sweep and thus the absence of narrow tailoring of § 19 in Part I, *supra*. Section 19 bars the candidacy of a wide class of state, federal, and foreign officeholders. The offices enumerated in § 19 include the judges of all courts, the Secretary of State, the Attorney General, the

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[9] "[T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." 330 U. S., at 96.

clerks of any court of record, and all persons holding any "lucrative" office under the United States, Texas, or any foreign government. Section 19 by its terms would bar, for example, a retired United States District Court Judge, appointed for life, whose District was outside of Texas, from running for the Texas State Legislature. The Texas courts have interpreted "lucrative" broadly enough to include any office that yields profit, gain, revenue, or salary, regardless of the adequacy of the compensation. See *Willis* v. *Potts*, 377 S. W. 2d 622, 625–627 (Tex. 1964). The state courts have also held that offices created by political bodies subordinate to the State, such as cities, are covered by § 19. See, *id.*, at 624–625.

Section 19 is not merely a resign-to-run law, or a prohibition on dual officeholding. Rather, the Texas Supreme Court has construed the phrase, "during the term for which he was elected or appointed," to bar candidacy for the legislature even *after* an official has resigned from his current office. See n. 4, *supra*. As one commentator has noted, § 19 "has trapped the unwary who believed (not unreasonably) that by resigning their present office they would be eligible to run for the legislature." 1 G. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 135 (1977).

In many of its applications § 19 has absolutely *no* connection to Texas' interest in how Texas public officials perform their current duties. This provision applies to persons holding office under the United States or any foreign government and would thus bar a person holding *federal* office from resigning from that office and running for the Texas Legislature.[10] Even with respect to persons who, like Baca, are

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[10] The Court, citing *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–616 (1973), states that Baca may not utilize the "overbreadth" doctrine to "challenge the provision's application to him on the grounds that the provision might be unconstitutional as applied to a class of officeholders not before

currently Texas public officials, § 19 continues to operate after their resignations from current positions have taken effect and their responsibility to the Texas electorate has ceased. A provision directed only at Texas officeholders, that gave those officeholders a choice between resigning and serving out their current terms would serve all of the asserted state interests; yet Texas has inexplicably chosen this far more restrictive alternative.[11]

The same irrationality evident to me when I analyzed § 19 under the Equal Protection Clause convinces me that it is not substantially related to furthering the asserted state interests. Appellants contend that § 19 promotes attention to

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the Court." *Ante*, at 972, n. 6. But all that *Broadrick* holds is "that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U. S., at 615. In my view, the overbreadth of Art. III, § 19, is clearly substantial, particularly when its breadth is viewed in relationship to its relatively tenuous "legitimate sweep."

[11] The less intrusive means for accomplishing the State's goals are obvious. A statute requiring persons to take a leave of absence would also preclude an officeholder from misusing his current office during a campaign. See *Bolin* v. *Minnesota*, 313 N. W. 2d 381, 384 (Minn. 1981). Appellants assert an interest in ensuring that defeated candidates do not return to office and administer their old position vindictively or half-heartedly. Brief for Appellants 9. But this would be satisfied by a resign-to-run statute—giving candidates a choice between running for a new office or holding their present position. Appellants suggest that even before an actual announcement of candidacy a potential candidate may begin to abuse his current office. *Id.*, at 13. They thus appear to suggest that a resign-to-run provision is not necessarily adequate because it allows the candidate to stay in his current position until his formal announcement of candidacy. Even if this is a sufficient state concern to justify further intrusion on the interests of potential candidates, it would be fully served by a statute that simply required all potential candidates to resign some period of time *before* they formally announced their candidacy for a new office. Unlike the plurality, I refuse to assume that the State has an interest in having officeholders who no longer desire to hold their office serve out their terms. See *ante*, at 968–969. Indeed, appellants have not asserted this interest in this Court or in the courts below.

current duties by officeholders and prevents abuse of their current office in the attempt to further political aspirations. But § 19 prohibits the enumerated officeholders from engaging only in Texas *legislative* campaigns. It has absolutely no effect on an officeholder who misuses his current office in order to undertake a campaign for any other office. Even if no improper motive underlies the restriction, it is obvious that § 19 is far more likely to discourage officeholders from running for the state legislature than it is to encourage them to serve properly in their current positions. See *supra*, at 980–983.

In sum, the prohibition of § 19 furthers in no substantial way any of the asserted state interests said to support it, and is not narrowly tailored to avoid unnecessary interference with the First Amendment interests of government employees. Accordingly, in my view, this provision is invalid as an unjustified infringement on appellees' First Amendment rights.[12]

Because the Court finds neither an equal protection nor a First Amendment violation in either of these restrictions on candidacy, I respectfully dissent.

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[12] Article XVI, § 65, also affects appellees' right to run for political office; it has a lesser impact on that right for it merely requires that candidates resign before embarking on political campaigns. Moreover, it bears a more substantial relationship to the State's asserted purposes because it bans political campaigns for all offices. That provision does not in my view violate the First Amendment. Because it applies only to an inexplicable group of elected officials, it does, however, violate the Equal Protection Clause.

Syllabus

BLUM, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* YARETSKY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80–1952. Argued March 24, 1982—Decided June 25, 1982

As a participating State in the Medicaid program established by the Social Security Act, New York provides Medicaid assistance to eligible persons who receive care in private nursing homes, which are designated as either "skilled nursing facilities" (SNF's) or "health related facilities" (HRF's), the latter providing less extensive, and generally less expensive, medical care than the former. The nursing homes are directly reimbursed by the State for the reasonable cost of health care services. To obtain Medicaid assistance, an individual must satisfy eligibility standards in terms of income or resources and must seek medically necessary services. As to the latter requirement, federal regulations require each nursing home to establish a utilization review committee (URC) of physicians whose functions include periodically assessing whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified. Respondents, who were Medicaid patients in an SNF, instituted a class action in Federal District Court after the nursing home's URC decided that they should be transferred to a lower level of care in an HRF and so notified local officials, and after administrative hearings resulting in affirmance by state officials of the local officials' decision to discontinue benefits unless respondents accepted transfer to an HRF. Respondents alleged, *inter alia*, that they had not been afforded adequate notice either of the URC decisions and the reasons supporting them or of their right to an administrative hearing to challenge those decisions, as required by the Due Process Clause of the Fourteenth Amendment. Respondents later added claims as to procedural safeguards that should also apply to URC decisions transferring a patient to a *higher* level of care and to transfers of any kind initiated by the nursing homes themselves or by the patients' attending physicians. Ultimately the court approved a consent judgment establishing procedural rights applicable to URC-initiated transfers to lower levels of care, and ruled in respondents' favor as to transfers to higher levels of care and all transfers initiated by the facility or its agent. The court permanently enjoined petitioner state officials and all SNF's and HRF's in the State from permitting

or ordering discharges of class members or their transfers to a different level of care, without prior written notice and an evidentiary hearing. The Court of Appeals affirmed, holding that URC-initiated transfers to a higher level of care and all discharges and transfers by nursing homes or attending physicians involved "state action" for purposes of the Fourteenth Amendment.

Held:

1. Respondents have standing to challenge the procedural adequacy of facility-initiated discharges and transfers to lower levels of care. Although respondents were threatened only with URC-initiated transfers to lower levels of care, and although the consent judgment in the District Court halted implementation of such URC decisions, the threat that the nursing homes might determine, independently of the URC decisions, that respondents' continued stay at current levels of care was not medically necessary is not imaginary or speculative but is quite realistic. However, the threat of transfers to *higher* levels of care is not of sufficient immediacy and reality that respondents presently have standing to seek an adjudication of the procedures attending such transfers. Thus the District Court exceeded its authority under Art. III in adjudicating the procedures governing transfers to higher levels of care. Pp. 999–1002.

2. Respondents failed to establish "state action" in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care and thus failed to prove that petitioners have violated rights secured by the Fourteenth Amendment. Pp. 1002–1012.

(a) The mere fact that a private business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. A State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement that the choice must in law be deemed to be that of the State. Pp. 1003–1005.

(b) The fact that the State responds to the nursing homes' discharge or transfer decisions by adjusting the patients' Medicaid benefits does not render it *responsible* for those decisions. Moreover, the pertinent statutes and regulations do not constitute affirmative commands by the State for summary discharge or transfer of Medicaid patients who are thought to be inappropriately placed in nursing facilities. The State, by requiring completion by physicians or nursing homes of forms relating to a patient's condition and discharge or transfer decisions, is not responsible for the decisions of the physicians or nursing homes. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State. Similarly, regulations imposing penalties on nursing homes that fail to discharge or transfer patients whose continued stay is inappropriate do

not themselves dictate the decision to discharge or transfer in a particular case. And even though the State subsidizes the cost of the facilities, pays the expenses of the patients, and licenses the facilities, the action of the nursing homes is not thereby converted into "state action." Nor do the nursing homes perform a function that has been "traditionally the exclusive prerogative of the State," *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 353, so as to establish the required nexus between the State and the challenged action. Pp. 1005–1012.

629 F. 2d 817, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *ante*, p. 843. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 1012.

Judith A. Gordon, Assistant Attorney General of New York, argued the cause for petitioners. With her on the briefs were *Robert Abrams*, Attorney General, *Shirley Adelson Siegel*, Solicitor General, *Andrea G. Iason*, Assistant Attorney General, and *Peter H. Schiff*.

John E. Kirklin argued the cause for respondents. With him on the brief were *Kalman Finkel* and *David Goldfarb*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents represent a class of Medicaid patients challenging decisions by the nursing homes in which they reside to discharge or transfer patients without notice or an opportunity for a hearing. The question is whether the State may be held responsible for those decisions so as to subject them to the strictures of the Fourteenth Amendment.

I

Congress established the Medicaid program in 1965 as Title XIX of the Social Security Act, 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. IV), to provide federal financial assist-

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**Toby S. Edelman* filed a brief for the National Citizens' Coalition for Nursing Home Reform as *amicus curiae* urging affirmance.

ance to States that choose to reimburse certain medical costs incurred by the poor. As a participating State, New York provides Medicaid assistance to eligible persons who receive care in private nursing homes, which are designated as either "skilled nursing facilities" (SNF's) or "health related facilities" (HRF's).[1] The latter provide less extensive, and generally less expensive, medical care than the former.[2] Nursing homes chosen by Medicaid patients are directly reimbursed by the State for the reasonable cost of health care services, N. Y. Soc. Serv. Law § 367–a.1 (McKinney Supp. 1981).

An individual must meet two conditions to obtain Medicaid assistance. He must satisfy eligibility standards defined in terms of income or resources and he must seek medically necessary services. See 42 U. S. C. § 1396. To assure that the latter condition is satisfied,[3] federal regulations require each nursing home to establish a utilization review committee (URC) of physicians whose functions include periodically as-

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[1] N. Y. Soc. Serv. Law § 365–a.2(b) (McKinney Supp. 1982). Title XIX requires as a condition to the receipt of federal funds that participating States provide financial assistance to eligible persons in need of "skilled nursing facility services." 42 U. S. C. §§ 1396a(a)(13)(B), 1396d(a)(4)(A) (1976 ed. and Supp. IV). Federal assistance is also available to States that choose to reimburse the cost of "intermediate care facility services." § 1396d(a)(15). See §§ 1396d(c), (f). New York regulations refer to facilities that provide the latter type of care as HRF's. 10 NYCRR § 414.1(a) (1981).

[2] Compare 10 NYCRR §§ 416.1–416.2 with §§ 421.1–421.2 (1978). The parties have stipulated that Medicaid reimbursement rates for HRF's are generally lower than those for SNF's. See App. 169, ¶ 12.

[3] Congress has provided that federal funds supplied to assist in reimbursing nursing home costs will be reduced unless the participating State provides for the periodic review of patient care "to safeguard against unnecessary utilization of such care and services and to assure that payments . . . are not in excess of reasonable charges consistent with efficiency, economy, and quality of care." 42 U. S. C. § 1396a(a)(30). See §§ 1396b(g)(1)(C), 1396b(i)(4), 1395x(k).

sessing whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified.[4] 42 CFR §§ 456.305, 456.406 (1981). If the URC determines that the patient should be discharged or transferred to a different level of care, either more or less intensive, it must notify the state agency responsible for administering Medicaid assistance.[5] 42 CFR §§ 456.337(c), 456.437(d) (1981); 10 NYCRR §§ 416.9(f)(2), (3), 421.13(f)(2), (3) (1980).

At the time their complaint was filed, respondents Yaretsky and Cuevas were patients in the American Nursing Home, an SNF located in New York City. Both were recipients of assistance under the Medicaid program. In December 1975 the nursing home's URC decided that respondents did not need the care they were receiving and should be transferred to a lower level of care in an HRF. New York City officials, who were then responsible for administering the Medicaid program in the city, were notified of this decision and prepared to reduce or terminate payments to the nursing home for respondents' care. Following administrative hearings, state social service officials affirmed the decision to discontinue benefits unless respondents accepted a transfer to an HRF providing a reduced level of care.

Respondents then commenced this suit, acting individually and on behalf of a class of Medicaid-eligible residents of New

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[4] These committees must be composed of private physicians who are not directly responsible for the patient whose care is being reviewed. 42 CFR §§ 456.306, 456.406 (1981). Under New York law, the committee members may not be employed by the SNF or HRF and may not have a financial interest in any residential care facility. 10 NYCRR §§ 416.9(b)(2), 421.13(b)(2) (1980).

[5] If the committee determines that a discharge or transfer is called for, it must afford the patient's attending physician an opportunity to present his views, although the committee's decision ultimately is final. 42 CFR §§ 456.336(f), (h), 456.436(f), (i) (1981). See 10 NYCRR §§ 731.11, 741.14 (1980).

York nursing homes.[6] Named as defendants were the Commissioners of the New York Department of Social Services and the Department of Health. Respondents alleged in part that the defendants had not afforded them adequate notice either of URC decisions and the reasons supporting them or of their right to an administrative hearing to challenge those decisions.[7] Respondents maintained that these actions violated their rights under state and federal law and under the Due Process Clause of the Fourteenth Amendment. They sought injunctive relief and damages.[8]

In January 1978 the District Court certified a class[9] and issued a preliminary injunction, restraining the defendants

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[6] The class was defined to include patients "who have been, are or will be threatened or forced to leave their nursing homes and have their Medicaid benefits reduced or terminated as a result of 'Utilization Review' committee findings alleging that they are not eligible for the level of nursing home care they receive." App. 19, ¶ 1. The complaint also named as a plaintiff the New York chapter of the Gray Panthers, an organization that "has among its objectives the development of a health care system for the elderly which provides quality health care to all persons." *Id.*, at 21, ¶ 5.

[7] The complaint also alleged that URC transfers to lower levels of care and corresponding reductions in Medicaid benefits were arbitrary and were caused by improperly constituted URC's that acted without adequate written criteria and failed to afford adequate notice either to the patients or their attending physicians.

[8] Ten individuals, who are also respondents in this Court, later intervened in the suit. Each intervenor was a resident of either an SNF or an HRF and had been the subject of a URC decision recommending transfer to a lower level of care. The intervenors all were afforded administrative hearings resulting in affirmance of petitioners' decisions to reduce or terminate Medicaid benefits if the intervenors did not follow URC recommendations.

[9] The class was defined to include "all persons who are residents in skilled nursing or intermediate care facilities in the State of New York and who, following utilization review recommendations and/or fair hearings, are determined by defendants to be ineligible to receive the level of care at the facilities in which they reside and to be subject to reduction or termination of their Medicaid benefits." *Id.*, at 45.

from reducing or terminating Medicaid benefits without timely written notice to the patients, provided by state or local officials, of the reasons for the URC decision, the defendants' proposed action, and the patients' right to an evidentiary hearing and continued benefits pending administrative resolution of the claim. App. 100–101, ¶2.[10] The court's accompanying opinion relied primarily on existing federal and state regulations. *Id.*, at 112–115.

In March 1979 the District Court issued a pretrial order that identified a new claim raised by respondents that a panoply of procedural safeguards should apply to URC decisions transferring a patient to a *higher*, *i. e.*, more intensive, level of medical care, as well as to decisions recommending transfers to a lower level of care. In addition, respondents claimed that such safeguards were required prior to transfers of any kind initiated by the nursing homes themselves or by the patients' attending physicians. *Id.*, at 157, ¶II(J); 166–167, ¶II(J). Respondents asserted that all of these transfers deprived patients of interests protected by the Fourteenth Amendment and were the product of "state action." *Id.*, at 167, ¶II(J).[11]

In October 1979 the District Court approved a consent judgment incorporating the relief previously awarded by the preliminary injunction and establishing additional substantive and procedural rights applicable to URC-initiated transfers to lower levels of care. *Id.*, at 227–239. The consent judgment left several issues of law to be decided by the District Court. The most important, for our purposes, was "whether there is state action and a constitutional right to

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[10] The court also required the defendants to afford class members access to all pertinent case files and medical records. *Id.*, at 101–102. The Court of Appeals for the Second Circuit upheld portions of the injunction challenged by petitioners. *Yaretsky* v. *Blum*, 592 F. 2d 65 (1979).

[11] The pretrial order also redefined the class to include "all residents of skilled nursing and health related nursing facilities in New York State who are recipients of Medicaid benefits." App. 151.

a pre-transfer evidentiary hearing in a patient transfer to a higher level of care and/or a patient transfer initiated by the facility or its agents." *Id.*, at 234–235, ¶ VIII(A)(1). Ultimately, the District Court answered that question in respondents' favor, although without elaborating its reasons. *Id.*, at 240. The court permanently enjoined petitioners, as well as all SNF's and HRF's in the State, from permitting or ordering the discharge of class members, or their transfer to a different level of care, without providing advance written notice and an evidentiary hearing on "the validity and appropriateness of the proposed action." *Id.*, at 242–243.

The Court of Appeals for the Second Circuit affirmed that portion of the District Court's judgment we have described above. 629 F. 2d 817 (1980).[12] The court held that URC-initiated transfers from a lower level of care to a higher one, and all discharges and transfers initiated by the nursing homes or attending physicians, "involve state action affecting constitutionally protected property and liberty interests." *Id.*, at 820. The court premised its identification of state action on the fact that state authorities "responded" to the challenged transfers by adjusting the patients' Medicaid benefits. *Ibid.* Citing our opinion in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974), the court viewed this response as establishing a sufficiently close "nexus" between the State and either the nursing homes or the URC's to justify treating their actions as those of the State itself.

We granted certiorari to consider the Court of Appeals' conclusions about the nature of state action. 454 U. S. 815 (1981). We now reverse its judgment.

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[12] The court modified the injunction by relieving petitioners of obligations that, in the opinion of federal authorities, would render the State ineligible for Medicaid funding. 629 F. 2d, at 822. The court also reversed the District Court's holding that state administrators were precluded by due process or state law from rejecting a hearing officer's recommendation favorable to a patient without reading a verbatim transcript of the hearing and the exhibits. *Id.*, at 822–825. This holding is not before us.

II

We first address a question raised by petitioners regarding our jurisdiction under Art. III. They contend that respondents, who were threatened with URC-initiated transfers to lower levels of care, are without standing to object either to URC-initiated transfers to higher levels of care or to transfers of any kind initiated by nursing homes or attending physicians. According to petitioners, respondents obtained complete relief in the consent judgment approved by the District Court in October 1979, which afforded substantive and procedural rights to patients who are the subject of URC-initiated transfers to lower levels of care. Since they have not been threatened with transfers of any other kind, they have no standing to object, and the District Court consequently was without Art. III jurisdiction to enter its judgment.

It is axiomatic that the judicial power conferred by Art. III may not be exercised unless the plaintiff shows "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979). It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject. See *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972).

Respondents appear to recognize these principles, but contend that although the October 1979 consent judgment halted the implementation of adverse URC decisions recommending discharge or transfer to lower levels of care, the URC determinations themselves were left undisturbed. These determinations reflected the judgment of physicians, chosen by the

nursing homes, that respondents' continued stay in their facilities was not medically necessary. Consequently, respondents maintain that they are subject to the serious threat that the nursing home administrators will reach similar conclusions and will themselves initiate patient discharges or transfers without adequate notice or hearings. Petitioners belittle this suggestion, noting that the consent judgment permanently enjoined all New York nursing homes, as well as petitioners, from implementing URC transfers to lower levels of care; this injunction bars the nursing homes from adopting the URC decisions as their own. Petitioners concede, however, that the consent judgment permits the nursing homes and respondents' attending physicians to decide independently to initiate transfers.

We conclude that the threat of facility-initiated discharges or transfers to lower levels of care is sufficiently substantial that respondents have standing to challenge their procedural adequacy. In reaching this conclusion, we are mindful of "the primary conception that federal judicial power is to be exercised . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe* v. *Ullman*, 367 U. S. 497, 504 (1961). Of course, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923), quoted in *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298 (1979). "[T]he question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy . . . ." *O'Shea* v. *Littleton*, 414 U. S. 488, 496 (1974). Even accepting petitioners' characterization of the scope of the permanent injunction embodied in the consent judgment, the nursing homes in which respondents reside remain free to determine independently that respondents' continued stay at current levels of care is not medically necessary. The possibility that they will do so is not "imaginary or speculative." *Younger* v. *Harris*, 401

U. S. 37, 42 (1971). In light of similar determinations already made by the committee of physicians chosen by the facilities to make such assessments, the threat is quite realistic. See *O'Shea* v. *Littleton*, *supra*, at 496 ("past wrongs are evidence bearing on whether there is real and immediate threat of repeated injury").

We cannot conclude, however, that the threat of transfers to *higher* levels of care, whether initiated by the URC's, the nursing homes, or attending physicians, is "of sufficient immediacy and reality," *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969), that respondents have standing to seek an adjudication of the procedures attending such transfers. Nothing in the record available to this Court suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers. It is not inconceivable that respondents will one day confront this eventuality, but assessing the possibility now would "tak[e] us into the area of speculation and conjecture." *O'Shea* v. *Littleton*, *supra*, at 497.[13]

Moreover, the conditions under which such transfers occur are sufficiently different from those which respondents do have standing to challenge that any judicial assessment of their procedural adequacy would be wholly gratuitous and advisory. Transfers to higher levels of care are recommended when the patient's medical needs cannot be satisfied by the facility in which he or she currently resides. Al-

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[13] Respondents suggest that members of the class they represent have been transferred to higher levels of care as a result of URC decisions. Respondents, however, "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975). Unless these individuals "can thus demonstrate the requisite case or controversy between themselves personally and [petitioners], 'none may seek relief on behalf of himself or any other member of the class.' *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974)." *Ibid.*

though respondents contend that all transfers threaten elderly patients with physical or psychological trauma, one may infer that *refusal* to accept a transfer to a higher level of care could itself be a decision with potentially traumatic consequences. The same cannot be said of discharges or transfers to less intensive care. In addition, transfers to more intensive care typically result in an *increase* in Medicaid benefits to match the increased cost of medically necessary care. Respondents' constitutional attack on discharges or transfers to a lower level of care presupposes a *deprivation* of protected property interests. Finally, since July 1978, petitioners have adhered to a policy permitting Medicaid patients to refuse URC-recommended transfers to higher levels of care without jeopardizing their Medicaid benefits. App. 180, ¶56. No similar policy was in force with respect to other transfers until the District Court mandated its adoption.

We conclude, therefore, that although respondents have standing to challenge facility-initiated discharges and transfers to lower levels of care, the District Court exceeded its authority in adjudicating the procedures governing transfers to higher levels of care. We turn now to the "state action" question presented by petitioners.

III

The Fourteenth Amendment of the Constitution provides in part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." Since this Court's decision in the *Civil Rights Cases*, 109 U. S. 3 (1883), "the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948). "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Ibid.* See *Jackson* v. *Metropolitan Edison Co.*, 419

U. S. 345 (1974); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970).

Faithful adherence to the "state action" requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint. In this case, respondents objected to the involuntary discharge or transfer of Medicaid patients by their nursing homes without certain procedural safeguards.[14] They have named as defendants state officials responsible for administering the Medicaid program in New York. These officials are also responsible for regulating nursing homes in the State, including those in which respondents were receiving care. But respondents are not challenging particular state regulations or procedures, and their arguments concede that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated. Their lawsuit, therefore, seeks to hold state officials liable for the actions of private parties, and the injunctive relief they have obtained requires the State to adopt regulations that will prohibit the private conduct of which they complain.

A

This case is obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it "state" action for purposes of the Fourteenth Amendment. See, *e. g.*, *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149 (1978); *Jackson* v. *Metropolitan Edison Co.*, *supra*; *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972);

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[14] "From the beginning of this lawsuit the respondents' challenge has been to the involuntary discharge or transfer of Medicaid patients from and by their nursing facilities without adequate safeguards . . . . Thus, the claim before this Court is whether state action attaches to a *nursing facility's summary discharge or transfer of the patient* . . . ." Brief for Respondents 21–22 (emphasis in original).

Adickes v. *S. H. Kress & Co.*, *supra*. It also differs from other "state action" cases in which the challenged conduct consists of enforcement of state laws or regulations by state officials who are themselves parties in the lawsuit; in such cases the question typically is whether the private motives which triggered the enforcement of those laws can fairly be attributed to the State. See, *e. g.*, *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963). But both these types of cases shed light upon the analysis necessary to resolve the present case.

First, although it is apparent that nursing homes in New York are extensively regulated, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S., at 350. The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.*, at 351. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. *Flagg Bros., Inc.* v. *Brooks*, *supra*, at 166; *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 357; *Moose Lodge No. 107* v. *Irvis*, *supra*, at 173; *Adickes* v. *S. H. Kress & Co.*, *supra*, at 170. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those

initiatives under the terms of the Fourteenth Amendment. See *Flagg Bros., supra,* at 164–165; *Jackson* v. *Metropolitan Edison Co., supra,* at 357.

Third, the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State." *Jackson* v. *Metropolitan Edison Co., supra,* at 353; see *Flagg Bros., Inc.* v. *Brooks, supra,* at 157–161.

B

Analyzed in the light of these principles, the Court of Appeals' finding of state action cannot stand. The court reasoned that state action was present in the discharge or transfer decisions implemented by the nursing homes because the State responded to those decisions by adjusting the patient's Medicaid benefits. Respondents, however, do not challenge the adjustment of benefits, but the discharge or transfer of patients to lower levels of care without adequate notice or hearings. That the State responds to such actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care.

Respondents do not rest on the Court of Appeals' rationale, however. They argue that the State "affirmatively commands" the summary discharge or transfer of Medicaid patients who are thought to be inappropriately placed in their nursing facilities. Were this characterization accurate, we would have a different question before us. However, our review of the statutes and regulations identified by respondents does not support respondents' characterization of them.

As our earlier summary of the Medicaid program explained, a patient must meet two essential conditions in order to obtain financial assistance. He must satisfy eligibility cri-

teria defined in terms of income and resources and he must seek medically necessary services. 42 U. S. C. § 1396. To assure that nursing home services are medically necessary, federal law requires that a physician so certify at the time the Medicaid patient is admitted and periodically thereafter. 42 U. S. C. § 1396b(g)(1) (1976 ed. and Supp. IV). New York requires that the physician complete a "long term care placement form" devised by the Department of Health, called the DMS–1. 10 NYCRR §§ 415.1(a), 420.1(b) (1980). A completed form provides, *inter alia*, a numerical score corresponding to the physician's assessment of the patient's mental and physical health. As petitioners note, however, the physicians, and not the forms, make the decision about whether the patient's care is medically necessary.[15] A physician can authorize a patient's admission to a nursing facility despite a "low" score on the form. See 10 NYCRR §§ 415.1(a)(2), 420.1(b)(2) (1978).[16] We cannot say that the

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[15] A completed DMS–1 form provides a summary of the patient's medical condition. Five of the eleven questions devoted to this subject require the assignment of numerical values. See 10 NYCRR App. C–1 (1978). A range of numerical values to be used in completing these questions are set forth in a second form, called the DMS–9. See *ibid.* The dissent's discussion of the DMS–9 suggests that completion of the DMS–1 form is a purely mechanical exercise that does not require the exercise of independent medical judgment. The dissent's discussion is incomplete. The other six questions on the DMS–1 ask the physician such questions as whether the patient requires daily supervision by a registered nurse, whether complications would arise without skilled nursing care, whether a program of therapy is necessary, and if so what kind, whether the patient should be considered for different levels of care, and whether the patient is medically qualified for the level of care he or she is receiving. The physician brings to bear his own medical judgment in answering these questions; their placement on the form would be inexplicable if the numerical scores were dispositive.

[16] The dissent belittles this fact by noting that the decision to depart from the form in admitting a patient is made by a physician member of the nursing home's URC, and that such persons are "part and parcel of the statutory cost control process." *Post*, at 1022. This signifies nothing more

State, by requiring completion of a form, is responsible for the physician's decision.

In any case, respondents' complaint is about nursing home decisions to discharge or transfer, not to admit, Medicaid patients. But we are not satisfied that the State is responsible for those decisions either.[17] The regulations cited by respondents require SNF's and HRF's "to make all efforts possible to transfer patients to the appropriate level of care or

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than the fact, disputed by no one, that the State requires utilization review in order to reduce unnecessary Medicaid expenditures. It remains true that physician members of the URC's are not employed by the State and, more important, render medical judgments concerning the patient's health needs that the State does not prescribe and for which it is not responsible. We must also emphasize, of course, that we are ultimately concerned with decisions to transfer patients who have already been admitted.

Apropos of this relevant issue, the dissent observes, *post*, at 1023, that once a patient has been admitted, the State requires, as a condition to the disbursement of Medicaid funds, that within five days after admission the nursing home operator assess the patient's status according to standards contained in the DMS–1 and DMS–9 forms. As the dissent is also aware, *post*, at 1023, n. 10, a physician member of the URC has the power to determine that the patient needs the level of care he is receiving despite an adverse score on the DMS–1. 10 NYCRR §§ 416.9(a)(2)(i), 421.13(a)(2)(i) (1980). That decision, rendered after consultation with the patient's attending physician, is purely a medical judgment for which the State, as before, is not responsible.

[17] The dissent condemns us for conducting a "cursory" review of the regulations governing utilization review, *post*, at 1019, and pointedly asks "where . . . is the Court's discussion of the frequent utilization reviews that occur *after* admission?" *Post*, at 1024. The dissent, in its headlong dive into the sea of state regulations, forgets that patient transfers to lower levels of care initiated by utilization review committees are simply not part of this case. As we noted earlier, such transfers were the subject of a consent judgment in October 1979. We are concerned only with transfers initiated by the patients' attending physicians or the nursing home administrators themselves. Therefore, we have focused on regulations that concern decisions which are not the product of URC recommendations. As we explain in the text, those regulations do not demonstrate that the State is responsible for the transfers with which we are concerned.

home as indicated by the patient's medical condition or needs," 10 NYCRR §§ 416.9(d)(1), 421.13(d)(1) (1980).[18] The nursing homes are required to complete patient care assessment forms designed by the State and "provide the receiving facility or provider with a current copy of same at the time of discharge to an alternate level of care facility or home." 10 NYCRR §§ 416.9(d)(4), 421.13(d)(4) (1980).

These regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State.[19] This case, therefore, is not unlike

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[18] Federal regulations also require SNF's and HRF's to obtain from admitting physicians a plan of discharge for each patient. 42 CFR §§ 456.280 (b)(6), 456.380(b)(6) (1981). State regulations require that nursing home staff members assist in the preparation of these plans, which are designed to summarize "the patient's potential for return to the community, for transfer to another more appropriate setting or for achieving or maintaining the best obtainable level of function in the nursing home." 10 NYCRR §§ 416.1(k)(2)(ii), 421.3(b)(2) (1976). These requirements hardly make the State responsible for actual decisions to discharge or transfer particular patients.

[19] The dissent characterizes as "factually unfounded," *post*, at 1014, our conclusion that decisions initiated by nursing homes and physicians to transfer patients to lower levels of care ultimately depend on private judgments about the health needs of the patients. It asserts that different levels of care exist only because of the State's desire to save money, and that the same interest explains the requirement that nursing homes transfer patients who do not need the care they are receiving. *Post*, at 1014–1019. We do not suggest otherwise. Transfers to lower levels of care are not mandated by the patients' health needs. But they occur only after an assessment of those needs. In other words, although "downward" transfers are made possible and encouraged for efficiency reasons, they can occur only after the decision is made that the patient does not need the care he or she is currently receiving. The State is simply not responsible for *that* decision, although it clearly responds to it. In concrete terms, therefore, if a par-

Polk County v. *Dodson*, 454 U. S. 312 (1981), in which the question was whether a public defender acts "under color of" state law within the meaning of 42 U. S. C. § 1983 when representing an indigent defendant in a state criminal proceeding.[20] Although the public defender was employed by the State and appointed by the State to represent the respondent, we concluded that "[t]his assignment entailed functions and obligations in no way dependent on state authority." *Id.*, at 318. The decisions made by the public defender in the course of representing his client were framed in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the State. The same is true of nursing home decisions to discharge or transfer particular patients because the care they are receiving is medically inappropriate.[21]

Respondents next point to regulations which, they say, impose a range of penalties on nursing homes that fail to discharge or transfer patients whose continued stay is inappropriate. One regulation excludes from participation in the

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ticular patient objects to his transfer to a different nursing facility, the "fault" lies not with the State but ultimately with the judgment, made by concededly private parties, that he is receiving expensive care that he does not need. That judgment is a medical one, not a question of accounting.

[20] This case, of course, does not involve the "under color of law" requirement of § 1983. Nevertheless, it is clear that the reasoning employed in *Polk County* is equally applicable to "state action" cases such as this one.

[21] Respondents also point to statutes requiring the State periodically to send medical review teams to conduct on-site inspections of all SNF's and HRF's. During these inspections, state employees are required to review the appropriateness of each patient's continued stay in the facility and to report their findings to the nursing home and the agency responsible for administering the Medicaid program in the State. 42 U. S. C. §§ 1396a(a)(26), (31), 1396b(g)(1)(D) (1976 ed. and Supp. IV). See 42 CFR § 456.611 (1981). Petitioners concede that these inspections can result in a discharge or transfer directed by state health officials. As they correctly argue, however, transfers of this kind are not the subject of respondents' complaint and none are presented by the record.

Medicaid program health care providers who "[f]urnished items or services that are substantially in excess of the beneficiary's needs." 42 CFR § 420.101(a)(2) (1981). The State is also authorized to fine health care providers who violate applicable regulations. 10 NYCRR § 414.18 (1978). As we have previously concluded, however, those regulations themselves do not dictate the decision to discharge or transfer in a particular case. Consequently, penalties imposed for violating the regulations add nothing to respondents' claim of state action.

As an alternative position, respondents argue that even if the State does not command the transfers at issue, it reviews and either approves or rejects them on the merits. The regulations cited by respondents will not bear this construction. Although the State requires the nursing homes to complete patient care assessment forms and file them with state Medicaid officials, 10 NYCRR §§ 415.1(a), 420.1(b) (1978), and although federal law requires that state officials review these assessments, 42 CFR §§ 456.271, 456.372 (1981), nothing in the regulations authorizes the officials to approve or disapprove decisions either to retain or discharge particular patients, and petitioners specifically disclaim any such responsibility. Instead, the State is obliged to approve or disapprove continued payment of Medicaid benefits after a change in the patient's need for services. See 42 CFR § 435.916 (1981). Adjustments in benefit levels in response to a decision to discharge or transfer a patient does not constitute approval or enforcement of that decision. As we have already concluded, this degree of involvement is too slim a basis on which to predicate a finding of state action in the decision itself.

Finally, respondents advance the rather vague generalization that such a relationship exists between the State and the nursing homes it regulates that the State may be considered a joint participant in the homes' discharge and transfer of Medicaid patients. For this proposition they rely upon

Burton v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). Respondents argue that state subsidization of the operating and capital costs of the facilities, payment of the medical expenses of more than 90% of the patients in the facilities, and the licensing of the facilities by the State, taken together convert the action of the homes into "state" action. But accepting all of these assertions as true, we are nonetheless unable to agree that the State is responsible for the decisions challenged by respondents. As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*. *Jackson* v. *Metropolitan Edison Co.*, 419 U. S., at 357–358. That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.

We are also unable to conclude that the nursing homes perform a function that has been "traditionally the exclusive prerogative of the State." *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 353. Respondents' argument in this regard is premised on their assertion that both the Medicaid statute and the New York Constitution make the State responsible for providing every Medicaid patient with nursing home services. The state constitutional provisions cited by respondents, however, do no more than authorize the legislature to provide funds for the care of the needy. See N. Y. Const., Art. XVII, §§ 1, 3. They do not mandate the provision of any particular care, much less long-term nursing care. Similarly, the Medicaid statute requires that the States provide funding for skilled nursing services as a condition to the receipt of federal moneys. 42 U. S. C. §§ 1396a(a)(13)(B), 1396d(a)(4)(A) (1976 ed. and Supp. IV). It does not require that the States provide the services themselves. Even if respondents' characterization of the State's duties were cor-

rect, however, it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. Indeed, respondents make no such claim, nor could they.

IV

We conclude that respondents have failed to establish "state action" in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care.[22] Consequently, they have failed to prove that petitioners have violated rights secured by the Fourteenth Amendment. The contrary judgment of the Court of Appeals is accordingly

Reversed.

[For opinion of JUSTICE WHITE concurring in the judgment, see *ante*, p. 843.]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

If the Fourteenth Amendment is to have its intended effect as a restraint on the abuse of state power, courts must be sensitive to the manner in which state power is exercised. In an era of active government intervention to remedy social ills, the true character of the State's involvement in, and coercive influence over, the activities of private parties, often through complex and opaque regulatory frameworks, may not always be apparent. But if the task that the Fourteenth Amendment assigns to the courts is thus rendered more burdensome, the courts' obligation to perform that task faithfully, and consistently with the constitutional purpose, is rendered more, not less, important.

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[22] As a postscript to their "state action" arguments, respondents suggest that this Court avoid the issue by holding that federal and state statutes and regulations require the procedural safeguards which they seek. The lower courts did not pass on this assertion, and we decline to do so as well.

In deciding whether "state action"[1] is present in the context of a claim brought under 42 U. S. C. § 1983 (1976 ed., Supp. IV), the ultimate determination is simply whether the § 1983 defendant has brought the force of the State to bear against the § 1983 plaintiff in a manner the Fourteenth Amendment was designed to inhibit. Where the defendant is a government employee, this inquiry is relatively straightforward. But in deciding whether "state action" is present in actions performed directly by persons other than government employees, what is required is a realistic and delicate appraisal of the State's involvement in the total context of the action taken. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961). See *Lugar* v. *Edmondson Oil Co.*, *ante*, at 939–942.[2] The Court today departs from the *Burton* precept, ignoring the

[1] As the Court noted in *Lugar* v. *Edmondson Oil Co.*, *ante*, at 926–932, the state action necessary to support a claimed violation of the Fourteenth Amendment, and the action "under color of law" required by 42 U. S. C. § 1983 (1976 ed., Supp. IV), represent parallel avenues of inquiry in a case claiming a remedy under § 1983 for a violation of the Fourteenth Amendment's Due Process Clause. Of course, the "color of law" inquiry required by § 1983 focuses directly on the question whether the conduct of the particular § 1983 defendant is sufficiently connected with the state action that is present whenever the constitutionality of a state law, regulation, or practice is properly challenged. But this question may just as easily be framed as whether the § 1983 defendant is a "state actor."

[2] In *Lugar*, we addressed a decidedly different question of "state action." In that case, the § 1983 plaintiff sought damages against a private party who had availed himself of an unconstitutional state attachment procedure, and had enlisted the aid of government officials to impair plaintiff's property for his own benefit. We concluded that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Ante*, at 941. Here the State affirmatively relies upon and requires private parties to implement specific deprivations of benefits according to standards and procedures that the State has established and enforces for its own benefit. The imprint of state power on the private party's actions would seem in this circumstance to be even more significant.

nature of the regulatory framework presented by this case in favor of the recitation of abstract tests and a pigeonhole approach to the question of state action. But however correct the Court's tests may be in the abstract, they are worth nothing if they are not faithfully applied. Bolstered by its own preconception of the decisionmaking process challenged by respondents, and of the relationship between the State, the nursing home operator, and the nursing home resident, the Court subjects the regulatory scheme at issue here to only the most perfunctory examination. The Court thus fails to perceive the decisive involvement of the State in the private conduct challenged by the respondents.

I

A

The Court's analysis in this case is simple, but it is also demonstrably flawed, for it proceeds upon a premise that is factually unfounded. The Court first describes the decision to transfer a nursing home resident from one level of care to another as involving nothing more than a physician's independent assessment of the appropriate medical treatment required by that resident. Building upon that factual premise, the Court has no difficulty concluding that the State plays no decisive role in the transfer decision: By reducing the resident's benefits to meet the change in treatment prescribed, the State is simply responding to "medical judgments made by private parties according to professional standards that are not established by the State." *Ante*, at 1008. If this were an accurate characterization of the circumstances of this case, I too would conclude that there was no "state action" in the nursing home's decision to transfer. A doctor who prescribes drugs for a patient on the basis of his independent medical judgment is not rendered a state actor merely because the State may reimburse the patient in different amounts depending upon which drug is prescribed.

But the level-of-care decisions at issue in this case, even when characterized as the "independent" decision of the nurs-

ing home, see *ante*, at 1000, have far less to do with the exercise of independent professional judgment than they do with the *State's* desire to save money. To be sure, standards for implementing the level-of-care scheme established by the Medicaid program are framed with reference to the underlying purpose of that program—to provide needed medical services. And not surprisingly, the State relies on doctors to implement this aspect of its Medicaid program. But the idea of two mutually exclusive levels of care—skilled nursing care and intermediate care—embodied in the federal regulatory scheme and implemented by the State, reflects no established medical model of health care. On the contrary, the two levels of long-term institutionalized care enshrined in the Medicaid scheme are legislative constructs, designed to serve governmental cost-containment policies.

The fiscal underpinning of the level-of-care determinations at issue here are apparent from the legislative history of the "intermediate care" concept. In 1967, Congress was concerned with the increasing costs of the Medicaid program. Congress' motivation in establishing a program of reimbursement for care in intermediate-care facilities flowed directly from these fiscal concerns. Thus the Senate Finance Committee Report on the Social Security Amendments of 1967, S. Rep. No. 744, 90th Cong., 1st Sess., 188 (1967), expressed concern with the fact that only skilled nursing care was available under Medicaid: "[B]ecause of a decided financial advantage to a State under present matching formulas," States tended to classify recipients as in need of "'skilled nursing home' care." As a consequence, the Report noted, "a strong case exists for introducing another level of care for which vendor payments would be available." *Ibid.* The result was an amendment to Title XI of the Social Security Act, creating a new treatment track for "categorically needy" medicaid patients, called "intermediate care." As summarized on the Senate floor:

> "The committee bill would provide for a vendor payment in behalf of persons . . . who are living in facilities

> which are more than boarding houses but which are less than skilled nursing homes. The rate of Federal sharing for payments for care in those institutions would be at the same rate as for medical assistance under title XIX. Such homes would have to meet safety and sanitation standards comparable to those required for nursing homes in a given state.
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> "*This provision should result in a reduction in the cost of title XIX by allowing States to relocate substantial numbers of welfare recipients who are now in skilled nursing homes in lower cost institutions.*" 113 Cong. Rec. 32599 (1967) (emphasis added).

To implement this cost-saving mechanism, the Federal Government has required States participating in the Medicaid Program to establish elaborate systems of periodic "utilization review."[3] With respect to patients whose expenses are not reimbursed through Medicaid, these attempts to assign the patient to one of two mutually exclusive "levels of care" would be anomalous. While the criteria used to determine which patients require the services of "skilled-nursing facilities," which require "intermediate care facilities," and which require no long-term institutional care at all, obviously have a medical nexus, those criteria are not geared to the

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[3] The State must provide for the periodic review of patient care "to safeguard against unnecessary utilization of such care and services and to assure that payments . . . are not in excess of reasonable charges consistent with efficiency, economy, and quality of care." 42 U. S. C. § 1396a(a)(30). See 42 U. S. C. §§ 1395x(k), 1396a(a)(31), 1396b(g)(1)(C) (1976 ed. and Supp. IV); 42 CFR §§ 456.305, 456.406 (1981). There is no need here to dwell on the very detailed federal requirements, except to note that if the State fails to ensure that the physician certifications and utilization review procedures are implemented for each patient in each facility, the State is subject to a loss of Medicaid funds commensurate with the extent of the failure to ensure such utilization review. See 42 U. S. C. §§ 1396b(g), (i)(4) (1976 ed. and Supp. IV); 42 CFR §§ 456.650–456.657 (1981).

specific needs of particular residents as determined by a physician; the level-of-care determination is *not* analogous to choosing specific medication or rehabilitative services needed by a nursing home patient. The inherent imprecision of using two broad levels to classify facilities and residents has been noted by the commentators.[4] The vigor with which these reviews are performed in the nursing home context, see *infra*, at 1022–1024, is extraordinarily *un*medical in character. From a purely medical standpoint, the idea of shifting nursing home residents from a "higher level of care" to a "lower level of care," which almost invariably involves transfer from one facility to another, rarely makes sense. As one commentator has observed: "These transfers eject helpless, disoriented people from the places they have lived for months or even years to facilities, not of their own choosing, that they have never seen before. The evidence is overwhelming that, without extraordinary preparatory efforts that are hardly ever made, *any* move is harmful for the preponderance of the frail elderly." B. Vladeck, Unloving Care 140 (1980).

The arbitrariness of the statutory system of treatment levels is evident from a comparison of the proportion of nursing home residents in skilled nursing facilities (SNF's) and those in intermediate care facilities (ICF's) in different States. A 1973 survey of 32 States revealed that 47.9% of Medicaid patients were in SNF's, 52.1% were in ICF's. But the proportion of SNF and ICF beds varied enormously from State to State. For example, less than 10% of Medicaid recipients receiving long-term institutional care in States such as Louisiana, Maine, Oregon, and Virginia were in SNF's; the number housed in SNF's in New York and Pennsylvania was nearly 80%, and in Florida and Georgia the figure was closer

[4] See, *e. g.*, Bishop, Plough, & Willemain, Nursing Home Levels of Care: Problems and Alternatives, 2 Health Care Financing Rev., No. 2, pp. 33, 36 (1980).

to 90%.[5] Quite obviously, the answer to this disparity lies not in medical considerations or judgments, but rather in the varying fiscal policies, and the vigor of enforcement, in the participating States.

In New York, the nursing home operator is required to "maintain a discharge planning program to . . . document that the facility *has made and is continuing to make all efforts possible to transfer patients to the appropriate level of care or home as indicated by the patient's medical condition or needs.*" 10 NYCRR § 416.9(d)(1) (1980) (emphasis added). See also § 421.13(d)(1).[6] The responsibility the State assigns to nursing home operators to transfer patients to appropriate levels of care is, of course, designed primarily to implement the State's goal of reducing Medicaid costs,[7] and the termination or reduction of benefits follows forthwith upon the facility's discharge or transfer of a resident. As the court below noted: "The state has, in essence, delegated a de-

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[5] See B. Vladeck, Unloving Care 138 (1980). "There is no reason to believe that Medicaid recipients in Georgia or Pennsylvania are ten times as likely to need skilled care as those in Oklahoma or Oregon, but they are ten times as likely to get it, or at least to get something called 'skilled care.'" *Id.*, at 137.

[6] If the nursing home fails to assign the patients to the level of care the State deems appropriate, it is subject to sanction. Federal regulations provide that health care providers who furnish "items or services that are substantially in excess of the beneficiary's needs" may be excluded from participating in the program. 42 CFR § 420.101(a)(2) (1981). A nursing home that fails to follow state regulations is also subject to state-imposed daily penalties. See 10 NYCRR § 414.18 (1978).

It is also clear that under the federal scheme, the State's responsibility extends to ensuring proper assessment of every resident. See 42 U. S. C. §§ 1396a(26)(A), 1396a(31)(A), 1396b(g)(1)(D) (1976 ed. and Supp. IV).

[7] To acknowledge that the active system of utilization review serves a primarily fiscal purpose is not to demean the importance of that purpose, or the extent of overplacement of Medicaid recipients in skilled nursing facilities. That figure has been variously estimated at 10 to 40 percent. See Bishop, Plough, & Willemain, *supra* n. 4.

cision to . . . reduce a public assistance recipient's benefits to a 'private' party," 629 F. 2d 817, 820 (CA2 1980), by assigning to that private party the responsibility to determine the recipient's need. But we should not rely on that fact alone in evaluating the nexus between the State and the challenged private action. Here the State's involvement clearly extends to supplying the standards to be used in making the delegated decision.

B

Ignoring the State's fiscal interest in the level-of-care determination, the Court proceeds to a cursory, and misleading, discussion of the State's involvement in the assignment of residents to particular levels of care. In my view, an accurate and realistic appraisal of the procedures actually employed in the State of New York leaves no doubt that not only has the State established the system of treatment levels and utilization review in order to further its own fiscal goals, but that the State prescribes with as much precision as is possible the standards by which individual determinations are to be made.

The Court notes that at the time of admission the admitting physician is required to complete a long-term placement form called the DMS–1. 10 NYCRR §§ 415.1(a), 420.1(b) (1978). The Court dismisses the significance of the form by noting blandly that a "completed form provides . . . a numerical score corresponding to the physician's assessment of the patient's mental and physical health," and then commenting: "As *petitioners* note, . . . the physicians, and not the forms, make the decision about whether the patient's care is medically necessary. A physician can authorize a patient's admission to a nursing facility despite a 'low' score on the form. See 10 NYCRR §§ 415.1(a)(2), 420.1(b)(2) (1978)." *Ante*, at 1006 (footnote omitted and emphasis added). The Court concludes: "We cannot say that the State, *by requiring completion of a form*, is responsible for the physician's decision."

Ante, at 1006–1007 (emphasis added). A closer look at the regulations at issue suggests that petitioners have been less than candid in their characterization of the admission process and the role of the numerical score.

New York's regulations *mandate* that the nursing home operator shall

> "admit a patient *only* on physician's orders *and* in accordance with the patient assessment criteria and standards as promulgated and published by the department (New York State LongTerm Care Placement Form [DMS–1] and New York State Numerical Standards Master Sheet [DMS–9]) . . . which shall include, as a minimum:
>
> "(1) an assessment, performed prior to admission by or on behalf of the agency or person seeking admission for the patient, of the patient's level of care needs *according to the patient assessment criteria and standards promulgated and published by the department.*" 10 NYCRR § 415.1 (1978) (emphasis added).

The details of the DMS–9 Numerical Standards Master Sheet also bear more emphasis than the Court gives them, for that form describes with particularity the patients who are entitled to SNF care, ICF care, or no long-term residential care at all. The DMS–9 provides numerical scores for various resident dysfunctions. For example, if the resident is incontinent with urine often, he receives a score of 20; if seldom, a score of 10; if never, a score of 0. A similar rating is made as to stool incontinence: often, 40; seldom, 20; never, 0. A tabulation is made with respect to "function status." For example, if the resident can walk only with "some help," he receives 35 points; only with "total help," 70 points; if he cannot walk, 105 points. If the resident needs "total help" to dress, he receives 80 points; if "some help" is required, 40 points. Ratings are also made of the patient's "mental status." For example, if the patient is never alert, he receives 40 points; if sometimes alert, 20 points; always alert, 0 points.

If his judgment is always impaired, he receives, 30 points; sometimes, 15 points; never, 0 points. And ratings are also set forth for other physical "impairments." For example, if the patient's vision is unimpaired, he receives 0 points; if he has partial sight, 1 point; if he is blind, 2 points.

The criterion for admission to a SNF is a DMS–9 "predictor score" of 180. 10 NYCRR § 415.1(a)(2) (1978). For admission to an HRF (health-related facility), the required score is 60. § 420.1(b)(2). Where the admission, or denial of admission, is based on the guidelines set forth in these regulations, there is, of course, no doubt, that the State is directly, and solely, "responsible for the specific conduct of which the plaintiff complains," *ante*, at 1004 (emphasis omitted), even if it has chosen to authorize a private party to implement that decision.[8]

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[8] The Court mistakes the significance of the DMS–1, and the relevant inquiry, when it attempts to characterize that form as merely an instrument for recording the exercise of an independently exercised medical judgment. See *ante*, at 1006, n. 15. Of course, a medical background is essential in filling out the forms. But it remains clear that the State's *standards* are to be applied in making the transfer determination.

The Court concludes that the patient assessment standards prescribed by the State may be easily disregarded. But the regulations themselves clearly demonstrate that those standards are not merely precatory. Notably, the regulations specify that "patient assessment standards shall *not* be applied to residents admitted to the residential health care facility prior to March 1, 1977." 10 NYCRR §§ 416.9(a)(1), 421.13(a)(1) (1980) (emphasis added). See also §§ 416.9(b)(4)(vi), 421.13(b)(4)(vi). If the forms merely recorded the exercise of an independent medical judgment, rather than prescribed the standards upon which that judgment must be exercised, why would it be necessary to exempt certain patients from the inquiry? Indeed, the regulations specifically provide for a *different* set of standards to be applied to the continued stay review of patients admitted to a facility prior to March 1, 1977. See 10 NYCRR §§ 416.9(b)(4)(vii), 421.13 (b)(4) (vii) (1980) ("the standards for residents admitted to the facility prior March 1, 1977 shall be developed by the utilization review agent and approved by the department"). Again, if the determination were in reality based on an independent medical assessment, it seems inconceivable to me that the State would have any interest in requiring different

The Court dismisses the specific state standards for denying admission set forth in the regulations, and tabulated according to the DMS–9, by emphasizing what it perceives as an alternative method for gaining admission to a nursing home. In the Court's view, this alternative route to admission takes the whole scheme outside the realm of state action because it hinges on a "physician's assessment" of what is medically necessary. In characterizing the admission process as the independent assessment of a physician, the Court relies upon, but fails to quote, the following state regulations. The language of those regulations bears noting:

> "[F]or those patients failing to meet the criteria and standards for admission to the . . . facility [as measured by the DMS–9], a certification *signed by a physician member of the transferring facility's utilization review agent or signed by the responsible social services district local medicaid medical director or designee* indicating the reason(s) the patient requires [the facility's level of care, is required]." 10 NYCRR § 415.1(a)(2) (1978) (emphasis added).

See also § 420.1(b)(2).

As this provision makes clear, if the potential resident does *not* qualify under the specific standards of the DMS–1, as tabulated on the DMS–9, the patient can be admitted *only* on the basis of direct approval by Medicaid officials themselves, or on the basis of a determination by the utilization review agent of the transferring facility—and, of course, such agents are themselves clearly part and parcel of the statutory cost-control process.[9] See n. 8, *supra*. No decision is made on

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standards for different patients depending on when the patient had been admitted.

[9] Federal regulations require each nursing home to establish a utilization review committee whose functions include review of admission decisions, and the periodic assessment of the resident's condition to determine whether the resident's continued stay in the facility is justified. See 42 CFR §§ 456.301, 456.406 (1981). These review agents, as they are deemed

the basis of a medical judgment exercised outside the regulatory framework, by the resident's personal physician acting on the basis of his personal medical judgment. The attending physician's role is, at this stage, limited to "scoring" the patient's condition according to standards set forth by the State on the DMS–9.

Yet the State's involvement does not end with the initial certification. Within five days *after* admission, the matter is again subjected to assessment, this time by the operator of the transferee facility. This time the transferee nursing home operator is required to tabulate the DMS–9 score. If the patient's score is not adequate by the standards of the DMS–9, admission must be denied unless sanctioned by the facility's utilization review agent.[10] The utilization review agent of the admitting facility, like that of the transferring facility, operates under a "written utilization control plan, approved by the department [of health]." 10 NYCRR §§ 416.9, 421.13 (1980). And that statutory body has the final say in

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in the New York regulations, are composed of physicians not directly responsible for the patient whose care is being reviewed. §§ 456.306, 456.606. Under New York law, the physicians of the review agent may not have a financial interest in a residential care facility. 10 NYCRR §§ 416.9(b)(2), 421.13(b)(2) (1980). In New York, the review agent generally consists of two or more physicians selected and appointed by the facility. *Medicaid provides reimbursement for their services.* App. 173.

[10] A physician member of the utilization review agent has the power to determine that the patient qualifies for the type of care that the facility offers, even if the patient's score on the DMS–1 is insufficient. 10 NYCRR §§ 416.9(a)(2)(i), 421.13(a)(2)(i) (1980). If that physician member confirms that the patient is not in need of the facility's level of care, he must then notify the patient's attending physician "and afford that physician an opportunity for consultation." § 416.9(a)(2)(ii). But even if the attending physician disagrees with the adverse admission finding of the utilization review agent physician, it is the utilization review agent, not the attending physician, that makes the admission decision. §§ 416.9(a)(2)(iv), 421.13(a)(2)(iv). The utilization review agent must, however, notify "the responsible social services district" of "any adverse admission decision." §§ 416.9(a)(3), 421.13(a)(3).

each instance. There can thus be little doubt that in the vast majority of cases, decisions as to "level of treatment" in the admission process are made according to the *State's* specified criteria. That some deviation from the most literal application of the State's guidelines is permitted cannot change the character of the State's involvement. Indeed, absent such provision for exceptional cases, the formularized approach embodied in the DMS–9 would be unconscionable. And indeed, even with respect to these exceptional cases, the admissions procedure is administered through bodies whose structure and operations conform to state requirements, and whose decisions follow state guidelines—albeit guidelines somewhat more flexible than the DMS–1, in allowing some "psychosocial" factors to be taken into account. See *infra*, this page and 1025–1026.

The Court dismisses all this by noting that "[w]e cannot say that the State, by requiring completion of a form, is responsible for the physician's decision." *Ante*, at 1006–1007. The Court then notes that "[i]n any case, respondents' complaint is about nursing home decisions to discharge or transfer, not to admit, Medicaid patients." *Ante*, at 1007. This is true, of course. But where, one might ask, is the Court's discussion of the frequent utilization reviews that occur *after* admission? The State's regulations require that the operator shall provide for "continued stay reviews . . . to promote efficient and effective use of available health facilities and services *every 30 days for the first 90 days, and every 90 days thereafter*, for each nursing home patient." 10 NYCRR §416.9(b)(1) (1980) (skilled nursing facilities) (emphasis added). See also §421.13(b)(1) (health-related facilities, every 90 days).

The continued stay reviews parallel the admission determination with respect to both the State's procedural and substantive standards.[11] Again, the DMS–1 and the DMS–9

[11] The Court takes issue with our reliance on the nature of continued stay reviews performed by the utilization review agent, noting that "patient

channel the medical inquiry and function as the principal determinants of the resident's status, for whenever a resident does not achieve an appropriate score on the DMS–1, as determined by a nonphysician representative of the utilization review agent, the resident's case is directed to a physician member. That physician member does not personally examine the resident, but rather relies on the DMS–1 and other documentary information. See App. 172–173. If the matter is resolved adversely to the resident, only then must the attending physician be notified. The attending physician is allowed to present relevant information, though the final decision remains with the utilization review agent. See 10 NYCRR §§ 416.9(b)(2), 421.13(b)(2) (1980). And again, the *State's* substantive standards, not independent medical judgment, pervade review determinations. Evaluations are based only on the DMS–1 and DMS–9 tabulation, on a "psychosocial" evaluation respecting the resident's response to transfer and other physical, emotional, and mental characteristics of the patient, on the resident's discharge plan (prepared according to state regulations), and upon "additional criteria and standards . . . *which shall have been approved*

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transfers to lower levels of care initiated by utilization review committees are simply not part of this case." *Ante*, at 1007, n. 17. The Court's position with respect to the work of the utilization review committee is schizophrenic at best: The Court expressly relies on its characterization of the review committee's work as representing an independent physician's assessment in reaching its conclusion that the DMS–1 and DMS–9 do not supply the criterion controlling the nursing home operator's decision to admit or retain a patient in the home. *Ante*, at 1006; see discussion *supra*, at 1022. In any event, the Court simply misses the point. The *nursing home operator* is under a continuing duty "to make all efforts possible to transfer patients to the appropriate level of care or home as indicated by the patient's medical condition or needs." 10 NYCRR §§ 416.9(d)(1), 421.13(d)(1) (1980). Whether performed through the utilization review agent, or whether undertaken by the nursing home operator directly, transfers premised on the "patient's medical condition or needs" are to be made with reference to the *State's* definition of "need."

by the department [of health]." 10 NYCRR §§ 416.9(b)(4), 421.13(b)(4) (1980) (emphasis added).[12]

The Court concludes with this assessment of the statutory scheme:

> "These regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Ante*, at 1008.

The Court is wrong. As a fair reading of the relevant regulations makes clear, the State (and Federal Government) have created, and administer, the level system as a cost-saving tool of the Medicaid program. The impetus for this

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[12] If it is finally determined by the utilization review agent that the patient should be assigned to a lower level of care, the regulations set forth an elaborate scheme of review before the State Department of Health. See 10 NYCRR §§ 416.9(f), 421.13(f) (1980). These provisions apply even when the attending physician concurs in the determination. The utilization review committee must notify the Department of Health of its adverse finding and

"send to the department a written statement setting forth, in specific detail, the changed medical conditions or other circumstances of the individual which support the utilization review agent's decision for transfer, and a copy of the completed patient assessment form (DMS–1) used by the utilization review agent in this review. *The department shall review the adverse continued stay finding.*" §§ 416.9(f)(2)(i), 421.13(f)(2)(i) (emphasis added).

See also §§ 421.13(f)(3)(i), 416.9(f)(3)(i). Of course, there is no doubt that the determinations made on this review represent state action because they are performed by state officials. But if the initial determinations were not made according to state-established standards and for the State's purposes, and were in fact "independent" medical decisions as characterized by the Court, it is difficult to understand the State's active role in reviewing the substance of those determinations.

active program of review imposed upon the nursing home operator is primarily this fiscal concern. The State has set forth precisely the standards upon which the level-of-care determinations are to be made, and has delegated administration of the program to the nursing home operators, rather than assume the burden of administering the program itself. Thus, not only does the program implement the State's fiscal goals, but, to paraphrase the Court, "[t]hese requirements . . . make the State responsible for actual decisions to discharge or transfer particular patients." See *ante*, at 1008, n. 18. Where, as here, a private party acts on behalf of the State to implement state policy, his action is state action.

II

The deficiency in the Court's analysis is dramatized by its inattention to the special characteristics of the nursing home. Quite apart from the State's specific involvement in the transfer decisions at issue in this case, the nature of the nursing home as an institution, sustained by state and federal funds, and pervasively regulated by the State so as to ensure that it is properly implementing the governmental undertaking to provide assistance to the elderly and disabled that is embodied in the Medicaid program, undercuts the Court's sterile approach to the state action inquiry in this case. The private nursing homes of the Nation exist, and profit, at the sufferance of state and federal Medicaid and Medicare agencies. The degree of interdependence between the State and the nursing home is far more pronounced than it was between the State and the private entity in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). The State subsidizes practically all of the operating and capital costs of the facility, and pays the medical expenses of more than 90% of its residents. And, in setting reimbursement rates, the State generally affords the nursing homes a profit as well. Even more striking is the fact that the residents of those homes are, by definition, utterly dependent on the State for

their support and their placement. For many, the totality of their social network is the nursing home community. Within that environment, the nursing home operator is the immediate authority, the provider of food, clothing, shelter, and health care, and, in every significant respect, the functional equivalent of a State. Cf. *Marsh* v. *Alabama*, 326 U. S. 501 (1946). Surely, in this context we must be especially alert to those situations in which the State "has elected to place its power, property and prestige behind" the actions of the nursing home owner. See *Burton* v. *Wilmington Parking Authority*, *supra*, at 725.

Yet, whatever might be the status of the nursing home operator where the State has simply left the resident in his charge, while paying for the resident's support and care, it is clear that the State has not simply left nursing home patients to the care of nursing home operators. No one would doubt that nursing homes are "pervasively regulated" by State and Federal Governments; virtually every action by the operator is subject to state oversight. But the question at this stage is not whether the procedures set forth in the state and federal regulatory scheme are sufficient to protect the residents' interests. We are confronted with the question *preliminary* to any Fourteenth Amendment challenge: whether the State has brought its force to bear against the plaintiffs through the office of these private parties. In answering that question we may safely assume that when the State chooses to perform its governmental undertakings through private institutions, and with the aid of private parties, not every action of those private parties is state action. But when the State directs, supports, and encourages those private parties to take specific action, that is state action.

We may hypothesize many decisions of nursing home operators that affect patients, but are not attributable to the State.[13] But with respect to decisions to transfer patients

[13] Of course, the nursing home operator's power to make transfer decisions for other than medical reasons is severely limited by regulation. He may only

downward from one level of care to another, if that decision is in any way connected with the statutory review structure set forth above,[14] then there is no doubt that the standard for decision, and impetus for the decision, is the responsibility of the State. Indeed, with respect to the level-of-care determination, the State does everything but pay the nursing home operator a fixed salary. Because the State is clearly responsible for the specific conduct of petitioners about which respondents complain, and because this renders petitioners state actors for purposes of the Fourteenth Amendment, I dissent.

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discharge or transfer the resident for valid medical reasons, for the welfare of the affected patient or other patients, or for nonpayment. 42 CFR §§ 405.1121(k)(4), 442.311(c) (1981); 10 NYCRR § 414.14(4) (1980).

[14] The issue presented in this case—the issue that the Court decides presents a live controversy—concerns *facility-initiated* discharges or transfers. See *ante*, at 1000. Transfers initiated by the Utilization Review Committee are within the terms of the consent decree entered by the District Court below, and are not before the Court today. These transfers even more clearly show the State's hand in the transfer decision—indeed, it appears that the physicians on the Committees are reimbursed for their services by Medicaid. But there is absolutely no basis upon which to conclude that that decision to transfer a patient to a lower level of care can be made in any meaningful way independently of the state regulatory standards described in text. Of course, we might hypothesize a decision of the resident's personal physician, not premised on the State's view of what constitutes an appropriate level of care for the patient, to remove the patient from the particular facility. In these circumstances, I would agree that the nursing home owner, in simply responding to the personal physician's request, is not a state actor. But it appears to me that the Court's decision sweeps more broadly than that, and clearly reaches transfers based directly upon and arising from the State's procedures and standards.

REPORTER'S NOTE

The next page is purposely numbered 1101. The numbers between 1029 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 7 THROUGH JUNE 22, 1982

JUNE 7, 1982

Appointment of Deputy Clerk

It is ordered that Christopher W. Vasil be, and he is hereby, appointed Deputy Clerk of this Court, effective June 1, 1982.

Appeals Dismissed

No. 81–1878. WILLIAMS *v.* CHEETWOOD & DAVIES ET AL. Appeal from Ct. App. Ohio, Wood County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81–6220. BEACH *v.* FLORIDA BAR. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81–1882. TOWN OF CHINO VALLEY ET AL. *v.* CITY OF PRESCOTT. Appeal from Sup. Ct. Ariz. Motion of Arizona for leave to intervene as a party appellee granted. Appeal dimissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this case. Reported below: 131 Ariz. 78, 638 P. 2d 1324.

No. 81–1974. BURLINGTON NORTHERN INC. *v.* HENRY, PERSONAL REPRESENTATIVE OF THE ESTATE OF HENRY, ET AL. Appeal from Sup. Ct. Mont. dismissed for want of jurisdiction. Reported below: —— Mont. ——, 645 P. 2d 1350.

No. 81–6294. ROBINSON *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 497 Pa. 49, 438 A. 2d 964.

Vacated and Remanded on Appeal

No. 81–1728. DONOVAN, SECRETARY OF LABOR *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL.; and

No. 81–1735. GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL. Appeals from D. C. W. D. Tex. Judgment vacated and cases remanded for further consideration in light of *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678 (1982). JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would note probable jurisdiction and set cases for oral argument.

Certiorari Granted—Vacated and Remanded. (See also No. 81–1097, *ante*, p. 52.)

No. 80–1435. ARMY AND AIR FORCE EXCHANGE SERVICE *v.* GORMAN. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Army and Air Force Exchange Service* v. *Sheehan*, 456 U. S. 728 (1982). Reported below: 619 F. 2d 1141.

No. 81–1561. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS *v.* SMITH. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Fletcher* v. *Weir*, 455 U. S. 603 (1982). Reported below: 660 F. 2d 237.

Miscellaneous Orders

No. A–992. ESCOBAR *v.* BANTIM, WARDEN, ET AL. Application for release, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–999 (81–2130). JOSEPH ET AL. *v.* BOND ET AL. C. A. 8th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–257. IN RE DISBARMENT OF GOTKIN. Disbarment entered. [For earlier order herein, see 455 U. S. 1012.]

No. D–275. IN RE DISBARMENT OF BOBBITT. It is ordered that Rique Bobbitt, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–276. IN RE DISBARMENT OF HUBBARD. It is ordered that Michael W. Hubbard, of Tyler, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–277. IN RE DISBARMENT OF BOEHM. It is ordered that Kenneth L. Boehm, of Hyattsville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL. Motion of New Mexico et al. for additional time for oral argument denied. [For earlier order herein, see, *e. g.*, 456 U. S. 1004.]

No. 81–349. CHICAGO BRIDGE & IRON CO. *v.* CATERPILLAR TRACTOR CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of appellees to schedule oral argument in tandem with No. 81–523, *Container Corporation of America* v. *Franchise Tax Board* [probable jurisdiction noted, 456 U. S. 960], denied. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 81–485. HILLSBORO NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. [Certiorari granted, 455 U. S. 906]; and

No. 81–930. UNITED STATES *v.* BLISS DAIRY, INC. C. A. 9th Cir. [Certiorari granted, 455 U. S. 906.] Motion of Bliss Dairy, Inc., for divided argument granted.

No. 81–1008. BURLINGTON NORTHERN INC. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. [Certiorari granted, 455 U. S. 988.] Motion of the Solicitor General for divided argument granted.

No. 81–1320. KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. *v.* LAWSON. C. A. 9th Cir. [Probable jurisdiction noted, 455 U. S. 999.] Motion of Wayne County Prosecutor for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81–1972. PORCHER, CLAIMS ADJUDICATOR, SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION, ET AL. *v.* BROWN ET AL. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81–6368. IN RE LUCAS. Petition for writ of mandamus denied.

Certiorari Granted

No. 81–1617. UNITED STATES *v.* PLACE. C. A. 2d Cir. Certiorari granted. Reported below: 660 F. 2d 44.

No. 81–1748. UNITED STATES *v.* MITCHELL ET AL. Ct. Cl. Certiorari granted. Reported below: 229 Ct. Cl. 1, 664 F. 2d 265.

No. 81–1350. UNITED STATES *v.* VILLAMONTE-MARQUEZ ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 652 F. 2d 481.

No. 81–1794. JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. *v.* BARNES. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 665 F. 2d 427.

Certiorari Denied. (See also Nos. 81–1878 and 81–6220, *supra.*)

No. 81–290. COMPAGNIE DES BAUXITES DE GUINEE *v.* INSURANCE CORPORATION OF IRELAND, LTD., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 651 F. 2d 877.

No. 81–738. NORTHWEST SPORTS ENTERPRISES, LTD. *v.* SEATTLE TOTEMS HOCKEY CLUB, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 852.

No. 81–1232. TEXAS ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 81–1478. HARVEY ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 661 F. 2d 832.

No. 81–1240. SWANSON-DEAN CORP. *v.* SEATTLE DISTRICT COUNCIL OF CARPENTERS. C. A. 9th Cir. Certiorari denied. Reported below: 646 F. 2d 376.

No. 81–1485. GRIFFITH CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 2d 406.

No. 81–1491. KIRSHENBAUM *v.* PENNSYLVANIA BOARD OF LAW EXAMINERS. Sup. Ct. Pa. Certiorari denied.

No. 81–1557. BORG WARNER CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 666.

No. 81–1643. WEBER ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 668 F. 2d 552.

No. 81–1673. PHILADELPHIA NATIONAL BANK ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 666 F. 2d 834.

No. 81–1714. DINNAN *v.* BLAUBERGS. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 2d 426.

No. 81–1742. MOORE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1318.

No. 81–1763. SHANAHAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–1799. HERITAGE PUBLISHING CO. *v.* CUMMINS, EXECUTRIX, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 124 Cal. App. 3d 305, 177 Cal. Rptr. 277.

No. 81–1835. PLACE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 660 F. 2d 44.

No. 81–1836. WATSON ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 312.

No. 81–1842. MURRAY, DBA BIG SKY TOYOTA *v.* TOYOTA MOTOR DISTRIBUTORS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 2d 1377.

No. 81–1873. ANDERSON *v.* ANDERSON. Sup. Ct. S. C. Certiorari denied.

No. 81–1896. HALIKAS *v.* RIVER REGION MENTAL HEALTH-MENTAL RETARDATION BOARD, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81–1899. JANNOTTI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 578.

No. 81–1900. HILLIS *v.* STEPHEN F. AUSTIN UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 547.

No. 81–1903. MID-CAROLINA OIL, INC., ET AL. *v.* KLIPPEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1313.

No. 81–1904. COBB *v.* WAINWRIGHT. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 966.

No. 81–1909. FORRESTER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–1918. ROCKINGHAM MACHINE-LUNEX CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 665 F. 2d 303.

No. 81–1997. GERALD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 590.

No. 81–2039. DELUCIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–2079. HENSEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 578.

No. 81–6140. SALISBURY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 738.

No. 81–6232. WRIGHT *v.* MURPHY, WARDEN, OKLAHOMA STATE PENITENTIARY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6262. BUTLER *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 81–6267. STACY ET AL. *v.* BEVENS, JUDGE, COURT OF COMMON PLEAS, PIKE COUNTY, OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 81–6279. ARCHER *v.* RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6280. DOUGLAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 2d 459.

No. 81–6388. TOBIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 381.

No. 81–6396. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 666 F. 2d 1196.

No. 81–6407. RUSSELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 211 U. S. App. D. C. 31, 655 F. 2d 1261, and 216 U. S. App. D. C. 165, 670 F. 2d 323.

No. 81–6458. NAJAR *v.* OMAN ET AL. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 624 S. W. 2d 385.

No. 81–6516. LANEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–6524. BECKER *v.* ROSS, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF LABOR. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 604, 432 N. E. 2d 142.

No. 81–6525. BAKER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 30 Wash. App. 1006.

No. 81–6527. ROY *v.* WATSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 669 F. 2d 611.

No. 81–6528. MASELLI *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6529. MARTIN *v.* LITTLE, BROWN & CO., INC. C. A. 1st Cir. Certiorari denied.

No. 81–6530. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 123 Cal. App. 3d 106, 176 Cal. Rptr. 390.

No. 81–6531. LEBEDUN *v.* YOUNG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1312.

No. 81–6532. PUENTE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 69 Ohio St. 2d 136, 431 N. E. 2d 987.

No. 81–6535. MCCARTHY *v.* O'CONNOR, EXECUTOR, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81–6537. ANGUIANO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–6538. CLAYTON *v.* DOUGLAS, WARDEN, LEXINGTON ASSESSMENT AND RECEPTION CENTER. C. A. 10th Cir. Certiorari denied. Reported below: 670 F. 2d 143.

No. 81–6543. BROWN *v.* BRYANT. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1306.

No. 81–6546. PASCHAL *v.* FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 1381.

No. 81–6547. WASHINGTON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81–6551. BARKSDALE *v.* BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 22.

No. 81–6552. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 183.

No. 81–6554. BILLINGSLEY *v.* VANN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 352.

No. 81–6558. GILL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–6559. BLACK *v.* EAST OHIO GAS CO. ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 81–6560. UNITED STATES EX REL. SIMMONS *v.* HILTON, SUPERINTENDENT, TRENTON STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 687.

No. 81–6573. HARRINGTON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 627 S. W. 2d 345.

No. 81–6576. KOURKENE *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–6647. DANIELS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 162, 673 F. 2d 553.

No. 81–6655. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 81–6658. THOMAS *v.* HAIG, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 162, 673 F. 2d 553.

No. 81–6664. GEORGE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81–6667. CAMPBELL *v.* CIVILETTI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1218.

No. 81–6671. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1331.

No. 81–6672. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 669 F. 2d 732.

No. 81–6676. HERNANDEZ *v.* UNITED STATES ATTORNEY GENERAL ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–1611. MARKS *v.* MARKS. Sup. Ct. N. M. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 81–1625. OREGON *v.* NEWMAN. Sup. Ct. Ore. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 292 Ore. 216, 637 P. 2d 143.

No. 81–1905. BROWN *v.* FEDERAL ELECTION COMMISSION. C. A. D. C. Cir. Motion of Center on National Labor Policy for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 217 U. S. App. D. C. 359, 672 F. 2d 893.

No. 81–1931. MEMORIAL PARK CEMETERY ASSN. ET AL. *v.* ROSEBROUGH MONUMENT CO. C. A. 8th Cir. Motions of American Cemetery Association et al. and Service Employees International Union, AFL–CIO, for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 666 F. 2d 1130.

No. 81–6512. HARRIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist.;

No. 81–6540. DRAKE *v.* GEORGIA. Sup. Ct. Ga.; and

No. 81–6549. JENT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81–6540, 248 Ga. 891, 287 S. E. 2d 180; No. 81–6549, 408 So. 2d 1024.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–1257. DONALD SCHRIVER, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 451 U. S. 976; and

No. 80–1666. LARSON, COMMISSIONER OF SECURITIES, MINNESOTA DEPARTMENT OF COMMERCE, ET AL. *v.* VALENTE ET AL., 456 U. S. 228. Petitions for rehearing denied.

No. 81–1411. PHELPS *v.* KANSAS SUPREME COURT ET AL., 456 U. S. 944;

No. 81–1492. STANDARD DRYWALL, INC. *v.* UNITED STATES, 456 U. S. 927;

No. 81–1704. HATCH ET UX. *v.* MADSEN, SUPERINTENDENT OF BANKS OF ARIZONA, RECEIVER, ET AL., 456 U. S. 962;

No. 81–6235. THOMPSON *v.* SOUTH CAROLINA, 456 U. S. 938;

No. 81–6265. NZONGOLA *v.* NZONGOLA, 456 U. S. 933;

No. 81–6266. NZONGOLA *v.* NZONGOLA, 456 U. S. 933; and

No. 81–6372. WADE *v.* TEXAS, 456 U. S. 964. Petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit for the period November 16, 1982, to November 18, 1982, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JUNE 9, 1982

Dismissal Under Rule 53

No. 81–2099. NATIONAL CASH REGISTER CORP. *v.* CHATLOS SYSTEMS, INC. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 670 F. 2d 1304.

JUNE 10, 1982

Dismissal Under Rule 53

No. 81–6301. BALDWIN *v.* BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY, ET AL., 456 U. S. 950. Petition for rehearing dismissed under this Court's Rule 53.

JUNE 14, 1982

Appeals Dismissed

No. 81–1953. STARVIEW DRIVE IN THEATRE, INC. *v.* COOK COUNTY, ILLINOIS, ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 100 Ill. App. 3d 624, 427 N. E. 2d 201.

No. 81–1964. GORRELL *v.* FOWLER ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 248 Ga. 801, 286 S. E. 2d 13.

No. 81–6382. DAVIS *v.* MISSISSIPPI. Appeal from Sup. Ct. Miss. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 406 So. 2d 795.

Certiorari Granted—Vacated and Remanded

No. 81–804. LOUISVILLE & JEFFERSON COUNTY TRANSIT AUTHORITY, DBA TRANSIT AUTHORITY OF RIVER CITY *v.* DIVISION 1447, AMALGAMATED TRANSIT UNION, AFL–CIO. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jackson Transit Authority* v. *Transit Union*, *ante*, p. 15. Reported below: 659 F. 2d 722.

No. 81–908. UNITED STATES *v.* SPIELER. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ross*, 456 U. S. 798 (1982). Reported below: 646 F. 2d 955.

No. 81–953. UNITED STATES *v.* CLEARY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Ross*, 456 U. S. 798 (1982). Reported below: 656 F. 2d 1302.

No. 81–1089. MAINE *v.* PATTEN. Sup. Jud. Ct. Me. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Ross*, 456 U. S. 798 (1982). Reported below: 436 A. 2d 387.

No. 81–1287. ALABAMA *v.* WRIGHT;
No. 81–1397. ALABAMA *v.* DANIELS;
No. 81–1514. ALABAMA *v.* BRACEWELL;
No. 81–1515. ALABAMA *v.* HILL;
No. 81–1662. ALABAMA *v.* DAVIS; and
No. 81–1809. ALABAMA *v.* HORSLEY. Ct. Crim. App. Ala. Motions of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Hopper* v. *Evans*, 456 U. S. 605 (1982). Reported below: No. 81–1287, 407 So. 2d 565; No. 81–1397, 406 So. 2d 1023; No. 81–1514, 407 So. 2d 854; No. 81–1515, 407 So. 2d 567; No. 81–1662, 408 So. 2d 532; No. 81–1809, 409 So. 2d 1347.

No. 81–1513. ALABAMA *v.* BRYARS. Ct. Crim. App. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hopper* v. *Evans*, 456 U. S. 605 (1982). Reported below: 407 So. 2d 566.

No. 81–1600. ALABAMA *v.* RITTER. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hopper* v. *Evans*, 456 U. S. 605 (1982). Reported below: 414 So. 2d 452.

No. 81–1995. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* HENRY. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Engle* v. *Isaac*, 456 U. S. 107 (1982). Reported below: 661 F. 2d 56.

Miscellaneous Orders

No. A–1056. SAN FRANCISCO POLICE OFFICERS ASSN. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (OFFICERS FOR JUSTICE ET AL., REAL PARTIES IN INTEREST). D. C. N. D. Cal. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of Mississippi for relief from the final decree entered in this case on December 12, 1960 [364 U. S. 502], referred to the Special Master. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier decision herein, see, *e. g.*, 456 U. S. 865.]

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL. Motion of New Mexico for leave to file a reply brief granted. [For earlier order herein, see, *e. g.*, *ante*, p. 1103.]

No. 81–298. COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA *v.* GOTTFRIED ET AL.; and

No. 81–799. FEDERAL COMMUNICATIONS COMMISSION *v.* GOTTFRIED ET AL. C. A. D. C. Cir. [Certiorari granted, 454 U. S. 1141.] Motion of respondents to reconsider order denying motion for divided argument denied.

No. 81–1064. CITY OF LOS ANGELES *v.* LYONS. C. A. 9th Cir. [Certiorari granted, 455 U. S. 937.] Motion of respondent to dismiss writ of certiorari as improvidently granted denied. Further consideration of the memorandum of petitioner suggesting a question of mootness and addressing related issues is deferred to hearing of case on the merits.

No. 81–6331. IN RE WANTLAND;

No. 81–6640. IN RE RICE; and

No. 81–6699. IN RE FELICIANO. Petitions for writs of mandamus denied.

No. 81–1493. GILLETTE CO. *v.* MINER. Sup. Ct. Ill. [Certiorari granted, 456 U. S. 914.] Motion of Plaintiffs in the "Dalkon Shield" IUD Products Liability Case for leave to file a brief as *amicus curiae* granted. Motions of New England Legal Foundation and National Association of Independent Insurers et al. for leave to file briefs as *amici curiae* granted.

No. 81–1852. MONTANA ET AL. *v.* CROW TRIBE OF INDIANS. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81–6715. IN RE CAMPBELL; and

No. 81–6760. IN RE WESER. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 81–1664. METROPOLITAN EDISON CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 663 F. 2d 478.

No. 81–1687. SONY CORPORATION OF AMERICA ET AL. *v.* UNIVERSAL CITY STUDIOS, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 659 F. 2d 963.

No. 81–419. TEXAS *v.* BROWN. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 617 S. W. 2d 196.

No. 81–1774. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* BULLARD. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 3 presented by the petition. Reported below: 665 F. 2d 1347.

Certiorari Denied. (See also No. 81–6382, *supra*.)

No. 81–912. CLICK ET AL. *v.* IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 102 Idaho 443, 631 P. 2d 614.

No. 81–1534. NIEVES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 658 F. 2d 14.

No. 81–1588. ILLINOIS EX REL. MYERS *v.* MEWS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 1199, 427 N. E. 2d 1050.

No. 81–1677. MANSION HOUSE CENTER SOUTH REDEVELOPMENT CO. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 661 F. 2d 724.

No. 81–1708. NEW ENGLAND POWER CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 215 U. S. App. D. C. 295, 668 F. 2d 1327.

No. 81–1732. WEIL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81–1757. JOSEPH ET AL. *v.* HELMS, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 360, 672 F. 2d 894.

No. 81–1777. MENGARELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1053.

No. 81–1815. HALEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 669 F. 2d 201.

No. 81–1817. LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL–CIO, CLC, ET AL. *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 666 F. 2d 618.

No. 81–1844. GORDONSVILLE INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 160, 673 F. 2d 551.

No. 81–1885. CBS INC. ET AL. *v.* COLUMBIA PICTURES INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 666 F. 2d 364.

No. 81–1886. SANDINI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 660 F. 2d 544.

No. 81–1911. NICOLL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 1308.

No. 81–1913. INTERNATIONAL MEDICATION SYSTEMS, LTD. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1031.

No. 81–1915. THORNTON *v.* ATLANTA & WEST POINT RAILROAD CO. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 352.

No. 81–1917. COUNTRY-WIDE INSURANCE CO. *v.* RODRIGUEZ ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 162, 433 N. E. 2d 118.

No. 81–1923. BOLYEA *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 412 So. 2d 482.

No. 81–1924. CHAMBERLAIN *v.* ARTHUR PHILLIPS & CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1298.

No. 81–1925. BAXTER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 274 Ark. 539, 626 S. W. 2d 935.

No. 81–1926. SPEED ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 412 So. 2d 502.

No. 81–1933. LEWIS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 429 N. E. 2d 1110.

No. 81–1928. FIDELITY TELEVISION, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 81–1929. MULTI-STATE COMMUNICATIONS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 216 U. S. App. D. C. 57, 670 F. 2d 215.

No. 81–1941. EATOUGH *v.* ALBANO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 671.

No. 81–1943. EVANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 352.

No. 81–1947. CASTRO *v.* TEXAS DEPARTMENT OF HUMAN RESOURCES. Ct. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 625 S. W. 2d 747.

No. 81–1948. KEATING *v.* KEATING, PERSONAL REPRESENTATIVE OF THE ESTATE OF KEATING. Ct. App. Wis. Certiorari denied. Reported below: 104 Wis. 2d 740, 313 N. W. 2d 280.

No. 81–1949. UNIROYAL, INC. *v.* SKAINES, DBA WYATT TIRE DISTRIBUTORS. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1330.

No. 81–1950. KOZMEL *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 88 Ill. 2d 512, 431 N. E. 2d 373.

No. 81–1951. VESSEL HOEGH SHIELD ET AL. *v.* GULF TRADING & TRANSPORTATION CO. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 363.

No. 81–1954. SHORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 671 F. 2d 178.

No. 81–1955. NAAS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 409 So. 2d 535.

No. 81–1956. VAN SICKLE *v.* VAN SICKLE. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 81–1959. SEMBLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 426.

No. 81–1960. JOHNSON *v.* GRANHOLM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 662 F. 2d 449.

No. 81–1969. WASHINGTON ET AL. *v.* FINLAY, MAYOR OF COLUMBIA, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 664 F. 2d 913.

No. 81–1991. BRAND *v.* BOISE SOUTHERN COMPANY OF DERIDDER, LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 669 F. 2d 732.

No. 81–2006. KITE ET AL. *v.* MARSHALL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 661 F. 2d 1027.

No. 81–2018. BERGER *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 159, 673 F. 2d 550.

No. 81–2050. BURLINGTON NORTHERN INC. *v.* WILSON. C. A. 8th Cir. Certiorari denied. Reported below: 670 F. 2d 780.

No. 81–2055. KONDRAT *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 178.

No 81–2058. HERITAGE HOMES OF ATTLEBORO, INC. *v.* SEEKONK WATER DISTRICT. C. A. 1st Cir. Certiorari denied. Reported below: 670 F. 2d 1.

No. 81–2059. SCHERER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 176.

No. 81–2070. LOFTEN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 817.

No. 81–2071. MATHIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 673 F. 2d 289.

No. 81–2074. REMSING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 2d 724.

No. 81–2076. KALITA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 81–2081. TAVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 1255.

No. 81–2087. CONWAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 924.

No. 81–2104. LEWIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–2115. PAK SHING LAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 713.

No. 81–2118. FERNANDEZ-URIARTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81–2123. MURPHY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–2141. KONDRAT *v.* UNITED STATES DEPARTMENT OF STATE. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 178.

No. 81–6289. PASSARO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 924.

No. 81–6302. HARRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 1158.

No. 81–6306. BALL *v.* ENGLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1217.

No. 81–6330. WANTLAND *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 636, 435 A. 2d 102.

No. 81–6355. OLIVO *v.* FOGG. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 873.

No. 81–6357. RUDOLPH *v.* ALLEN. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 519.

No. 81–6391. MONK *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 1079.

No. 81–6423. JOHNSTONE *v.* WOLFF, DIRECTOR, NEVADA STATE PRISON. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 922.

No. 81–6461. BEZAK *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81–6471. BUCKHANA ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 99 Ill. App. 3d 889, 425 N. E. 2d 1297.

No. 81–6489. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 914.

No. 81–6490. MANDRACHIO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 906, 433 N. E. 2d 1272.

No. 81–6519. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 911.

No. 81–6545. BAINTER *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 704.

No. 81–6553. LAGASSE *v.* VESTAL, WARDEN, MAINE STATE PRISON, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 671 F. 2d 668.

No. 81–6555. HUDGINS *v.* HARRIS, SHERIFF OF MECKLENBURG COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1311.

No. 81–6556. BIRDEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 56 N. Y. 2d 594, 435 N. E. 2d 1101.

No. 81–6557. GOPMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 1383.

No. 81–6561. PIETROWSKI *v.* ESTELLE. C. A. 5th Cir. Certiorari denied.

No. 81–6562. REITER *v.* THOMAS. Ct. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 81–6563. WILLIAMS *v.* ARKANSAS PUBLIC SERVICE COMMISSION. Sup. Ct. Ark. Certiorari denied. Reported below: 275 Ark. xxii.

No. 81–6568. TURNER *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1223.

No. 81–6569. BRAGG *v.* LEVERETTE, WARDEN, WEST VIRGINIA PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 690.

No. 81–6574. BOAG *v.* RAINES, INSTITUTIONAL ADMINISTRATOR, ARIZONA STATE PRISON. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1336.

No. 81–6575. HOLSEY *v.* ELLIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1040.

No. 81–6578. MOBLEY *v.* TABOR ET AL. C. A. 11th Cir. Certiorari denied.

No. 81–6579. ATKINS *v.* GREER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 679 F. 2d 893.

No. 81–6580. RIVERA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 127 Cal. App. 3d 136, 179 Cal. Rptr. 384.

No. 81–6584. SLAYTON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–6585. TAYLOR *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied.

No. 81–6587. MARK *v.* SEATTLE TIMES ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 96 Wash. 2d 473, 635 P. 2d 1081.

No. 81–6595. MATTHEWS *v.* EXXON CORP. C. A. 5th Cir. Certiorari denied. Reported below: 669 F. 2d 732.

No. 81–6616. CALZARANO *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 491.

No. 81–6624. BROOKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 148.

No. 81–6641. SMALLWOOD *v.* PONTE. C. A. 1st Cir. Certiorari denied.

No. 81–6652. NEUSTEIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 445.

No. 81–6662. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 1385.

No. 81–6680. TUCKER *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1054.

No. 81–6682. JOHN *v.* CARLSON, DIRECTOR, UNITED STATES BUREAU OF PRISONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 686.

No. 81–6686. PETTEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1319.

No. 81–6695. KING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 2d 675.

No. 81–6697. DARKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 714.

No. 81–6700. INGRAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 817.

No. 81–6701. MALLORY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 674 F. 2d 224.

No. 81–6702. MORAN *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 425.

No. 81–6709. HERNANDEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–6712. LOZADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 674 F. 2d 167.

No. 81–6718. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 622.

No. 81–6719. PETTEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 890.

No. 81–6724. PERKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 671 F. 2d 1377.

No. 81–6728. GOODWIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 695.

No. 81–6731. ODOM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 674 F. 2d 228.

No. 81–6738. VLASIC *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81–6741. LOCKHART *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 698.

No. 81–6749. DEVINCENT *v.* PUTNAM, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 709.

No. 81–1387. VOLUNTARY PURCHASING GROUPS, INC. *v.* CHEVRON CHEMICAL CO. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 659 F. 2d 695.

No. 81–1919. GROUNDS ET AL. *v.* MOBIL OIL CORP. ET AL.;

No. 81–1920. PANHANDLE EASTERN PIPE LINE CO. ET AL. *v.* MOBIL OIL CORP. ET AL.;

No. 81–1921. NORTHERN NATURAL GAS CO. ET AL. *v.* MOBIL OIL CORP. ET AL.; and

No. 81–1922. CITIES SERVICE GAS CO. ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 666 F. 2d 1279.

No. 81–5597. HOPPER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari.

Rehearing Denied

No. 81–1569. ROGERS, PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN, ET AL. *v.* WHITE, 456 U. S. 928;

No. 81–6304. COLLINS *v.* ZANT, WARDEN, 456 U. S. 950;

No. 81–6358. WALKER *v.* TEXAS, 456 U. S. 963;

No. 81–6364. MEDVED *v.* UNITED STATES, 456 U. S. 963;

No. 81–6367. MCCRARY *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, 456 U. S. 963;

No. 81–6369. WILLIAMS *v.* EVERETT, DIRECTOR, ARKANSAS DEPARTMENT OF LABOR, 456 U. S. 963;

No. 81–6467. MCDONALD *v.* THOMPSON ET AL., 456 U. S. 981;

No. 81–6476. KIMBERLIN *v.* UNITED STATES, 456 U. S. 964; and

No. 81–6577. ROMIEH *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL., 456 U. S. 994. Petitions for rehearing denied.

No. 79–6180. RAYSOR *v.* STERN, ADMINISTRATOR, NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, ET AL., 446 U. S. 942; and

No. 81–5333. RAYSOR *v.* GABBEY ET AL., 454 U. S. 1100. Motion for leave to file petition for rehearing denied.

JUNE 17, 1982

Miscellaneous Order

No. A–1086. ASSARSSON *v.* UNITED STATES. Application for stay of extradition and bail, presented to JUSTICE STEVENS, and by him referred to the Court, denied. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

JUNE 21, 1982

Appeals Dismissed

No. 81–1589. HUNT *v.* COLLINS. Appeal from Sup. Ct. Ga. dismissed for want of properly presented federal question. Reported below: 248 Ga. 611, 287 S. E. 2d 216.

No. 81–1999. SEYMOUR NATIONAL BANK, AS GUARDIAN FOR O'SULLIVAN, ET AL. *v.* INDIANA. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: —— Ind. ——, 428 N. E. 2d 203.

Certiorari Granted—Vacated and Remanded. (See also No. 81–1444, *ante*, p. 594.)

No. 81–1736. UNITED STATES *v.* SHARPE ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ross*, 456 U. S. 798 (1982). Reported below: 660 F. 2d 967.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In *United States* v. *Ross*, 456 U. S. 798, we addressed the question "whether, in the course of a legitimate warrantless

search of an automobile, police are entitled to open containers found within the vehicle." *Id.*, at 817. We held that the scope of a legitimate warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found. The issue presented in this case is whether a warrantless search was itself legitimate. Since our opinion in *United States* v. *Ross* sheds no light on the proper disposition of the case, I respectfully dissent.

No. 81–1496. SPIESS ET AL. *v.* C. ITOH & CO. (AMERICA), INC. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sumitomo Shoji America, Inc.* v. *Avagliano, ante*, p. 176. Reported below: 643 F. 2d 353.

No. 81–1761. ECKERD DRUGS, INC., ET AL. *v.* BROWN ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *General Telephone Co. of Southwest* v. *Falcon, ante*, p. 147. Reported below: 663 F. 2d 1268 and 669 F. 2d 913.

No. 81–1849. UNITED STATES *v.* CURRIE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Goodwin, ante*, p. 368. Reported below: 667 F. 2d 1251.

Miscellaneous Orders

No. A–1054. FLORIDA BUSINESSMEN FOR FREE ENTERPRISE ET AL. *v.* CITY OF HOLLYWOOD ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied. JUSTICE REHNQUIST and JUSTICE STEVENS took no part in the consideration or decision of this application.

No. ——. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* TAXATION WITH REPRESENTATION OF WASHINGTON. Motion of Disabled American Veterans and Paralyzed Veterans of America for leave to intervene as party appellants denied. Motion of American Legion for leave to intervene as a party appellee denied. Motion of Veterans of Foreign Wars of the United States for leave to intervene denied. JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would defer further consideration of these motions to the docketing and consideration of the jurisdictional statement.

No. A–1064. HOWELL & HOWELL, INC., ET AL. *v.* LOCAL UNION NO. 118, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES. Application for injunction pending appeal, addressed to JUSTICE STEVENS and referred to the Court, denied. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

No. A–1084. BROOKS ET AL. *v.* WINTER, GOVERNOR OF MISSISSIPPI, ET AL. D. C. N. D. Miss. Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

No. D–270. IN RE DISBARMENT OF MORITZ. Andrew Bruce Moritz, of San Diego, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on May 3, 1982 [456 U. S. 957], is hereby discharged.

No. 81–1044. UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS *v.* AIKENS. C. A. D. C. Cir. [Certiorari granted, 455 U. S. 1015.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 80–1190. PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC. *v.* SWINT ET AL.; and

No. 80–1193. UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* SWINT ET AL., 456 U. S. 273. Motion of respondents Louis Swint and Willie James Johnson for leave to proceed *in forma pauperis*, *nunc pro tunc*, denied.

No. 80–2128. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* HENSLEY, 456 U. S. 904. Motion of respondent for approval of attorney's fees denied without prejudice to applying for the relief in the United States Court of Appeals for the District of Columbia Circuit. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. 81–1489. XEROX CORP. *v.* COUNTY OF HARRIS, TEXAS, ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. [Probable jurisdiction noted, 456 U. S. 913.] Motion of appellees for divided argument and for additional time for oral argument denied.

No. 81–6793. IN RE JONES. Petition for writ of habeas corpus denied.

No. 81–6602. IN RE SMILEY; and

No. 81–6611. IN RE SCOTT. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 81–731. ARKANSAS ELECTRIC COOPERATIVE CORP. *v.* ARKANSAS PUBLIC SERVICE COMMISSION. Appeal from Sup. Ct. Ark. Probable jurisdiction noted. Reported below: 273 Ark. 170, 618 S. W. 2d 151.

No. 81–1839. MINNEAPOLIS STAR & TRIBUNE CO. *v.* MINNESOTA COMMISSIONER OF REVENUE. Appeal from Sup. Ct. Minn. Probable jurisdiction noted. Reported below: 314 N. W. 2d 201.

No. 81–2057. KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL. *v.* DAGGETT ET AL. Appeal from D. C. N. J. Probable jurisdiction noted. Reported below: 535 F. Supp. 978.

No. 81–1863. UNITED STATES ET AL. *v.* GRACE ET AL. Appeal from C. A. D. C. Cir. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 214 U. S. App. D. C. 375, 665 F. 2d 1193.

Certiorari Granted

No. 81–857. MARTINEZ, AS NEXT FRIEND OF MORALES *v.* BROCKETTE, TEXAS COMMISSIONER OF EDUCATION, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 648 F. 2d 425.

No. 81–1938. UNITED STATES *v.* BAGGOT. C. A. 7th Cir. Certiorari granted. Reported below: 662 F. 2d 1232.

No. 81–1966. BELKNAP, INC. *v.* HALE ET AL. Ct. App. Ky. Certiorari granted.

No. 81–1802. UNITED STATES *v.* KNOTTS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 662 F. 2d 515.

No. 81–1983. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* CAMPBELL. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 665 F. 2d 48.

No. 81–2101. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. C. A. 3d Cir. Motion of respondents Terri Lee Halderman et al. for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 673 F. 2d 647.

No. 81–1945. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION ET AL. C. A. 9th Cir. Certiorari granted limited to the following questions: Whether petitioners' challenges to the provisions in the 1976 amendments to California's Warren-Alquist Act, Cal. Pub. Res. Code Ann. §§ 25524.1(b) and 25524.2 (West 1977), which condition the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for high-level nuclear waste, are ripe for judicial review, and whether §§ 25524.1(b) and 25524.2 are pre-empted by the Atomic Energy Act of 1954, 42 U. S. C. § 2011 *et seq.* Reported below: 659 F. 2d 903.

Certiorari Denied

No. 81–1552. BINDER *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1030.

No. 81–1679. CASSEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 969.

No. 81–1682. SCACCHETTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 643.

No. 81–1699. EARLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1318.

No. 81–1703. LAMBERT *v.* WATTIGNY. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 408 So. 2d 1126.

No. 81–1749. WILSHIRE OIL COMPANY OF TEXAS *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. 3d Cir. Certiorari denied. Reported below: 668 F. 2d 732.

No. 81–1791. GROUP LIFE & HEALTH INSURANCE CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 1042.

No. 81–1793. RAGUSA ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 696.

No. 81–1804. RCA CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 664 F. 2d 881.

No. 81–1811. SLATER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 732.

No. 81–1821. SUPER EXCAVATORS, INC. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 674 F. 2d 592.

No. 81–1868. COUNCIL OF PUBLIC UTILITY MAILERS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 1186.

No. 81–1897. ANTHONY *v.* UNITED STATES ET AL.; and ANTHONY *v.* WEST, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA (UNITED STATES, REAL PARTY IN INTEREST). C. A. 10th Cir. Certiorari denied. Reported below: 667 F. 2d 870 (first case); 672 F. 2d 796 (second case).

No. 81–1907. REGILIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 669 F. 2d 1169.

No. 81–1934. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 889.

No. 81–1944. PACIFIC LEGAL FOUNDATION ET AL. *v.* STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 903.

No. 81–1967. CANNON ET AL. *v.* CONSOLIDATED RAIL CORP. ET AL.; and

No. 81–1992. UNITED TRANSPORTATION UNION *v.* CONSOLIDATED RAIL CORP. ET AL. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 535 F. Supp. 697.

No. 81–1968. LIBERATORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 669 F. 2d 391.

No. 81–1971. TRUSTEES OF THE FIRST BAPTIST CHURCH OF SILVER SPRING, MARYLAND *v.* SUPERVISOR OF ASSESSMENTS OF MONTGOMERY COUNTY, MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 50 Md. App. 751.

No. 81–1979. SLIWOO *v.* UNITED STATES; and
No. 81–6586. MAZZIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–1982. SWOBODA, PERSONAL REPRESENTATIVE OF THE ESTATE OF SWOBODA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 326.

No. 81–1994. BULLOCK *v.* ADAMS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 379, 430 N. E. 2d 534.

No. 81–2000. THOMAS MERTON CENTER *v.* ROCKWELL INTERNATIONAL CORP. ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 497 Pa. 460, 442 A. 2d 213.

No. 81–2002. STALLINGS *v.* FLETCHER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1223.

No. 81–2009. YEO *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 103 Mich. App. 418, 302 N. W. 2d 883.

No. 81–2028. ZISOOK ET AL. *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 88 Ill. 2d 321, 430 N. E. 2d 1037.

No. 81–2036. BENNETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 416 So. 2d 1114.

No. 81–2043. OIL TRANSPORT CO. ET AL. *v.* UNION OF TRANSPORTATION EMPLOYEES. C. A. 5th Cir. Certiorari denied. Reported below: 668 F. 2d 821.

No. 81–2047. BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS FOR TEXAS, ET AL. *v.* BRIGGS ET AL. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 623 S. W. 2d 508.

No. 81–2086. GREEN ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 671 F. 2d 46.

No. 81–2092. BONKOWSKY *v.* BONKOWSKY. Sup. Ct. Ohio. Certiorari denied. Reported below: 69 Ohio St. 2d 152, 431 N. E. 2d 998.

No. 81–2133. WEINGARTNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–2134. BENAVIDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 1255.

No. 81–2148. QUINTANA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 673 F. 2d 296.

No. 81–2175. BIGLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 174.

No. 81–2177. BELTEMPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 675 F. 2d 472.

No. 81–6089. PETSCHEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 2d 515.

No. 81–6296. JENNINGS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 431 A. 2d 552.

No. 81–6375. UDZIELA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 671 F. 2d 995.

No. 81–6380. LUPO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 652 F. 2d 723.

No. 81–6383. WILSON *v.* TILLMAN, JUDGE, CIRCUIT COURT OF ST. LOUIS CITY. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 706.

No. 81–6408. DOE *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 97 N. M. 263, 639 P. 2d 72.

No. 81–6415. GREEN *v.* UNITED STATES PROBATION OFFICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81–6444. MEINSTER *v.* UNITED STATES; and
No. 81–6445. MYERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 971.

No. 81–6448. LYONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 2d 77.

No. 81–6472. CABALLERY *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 673 F. 2d 43.

No. 81–6491. STEEDMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 666 F. 2d 69.

No. 81–6591. JENKINS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1325.

No. 81–6592. DODSON *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 4 Ark. App. 1, 626 S. W. 2d 624.

No. 81–6600. SAWYER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 297 Pa. Super. 517, 441 A. 2d 449.

No. 81–6603. ADAMS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–6604. FISHER ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 96 Wash. 2d 962, 639 P. 2d 743.

No. 81–6608. WOODEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 81–6609. RAWLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 2d 436.

No. 81–6614. HISHAW *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–6617. WOODS, AKA EASON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 1200, 434 N. E. 2d 1202.

No. 81–6618. TAVARES *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 385 Mass. 140, 430 N. E. 2d 1198.

No. 81–6619. JOHNSON *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 693.

No. 81–6620. HOLSEY *v.* CIRCUIT COURT FOR WASHINGTON COUNTY. Ct. App. Md. Certiorari denied.

No. 81–6623. BENNETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 409 So. 2d 936.

No. 81–6627. JORDEN *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–6630. HOOVER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 81–6634. CRAWFORD *v.* LITTLE. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 1200, 426 N. E. 2d 1286.

No. 81–6635. DARROCH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 305 N. C. 196, 287 S. E. 2d 856.

No. 81–6637. MOORE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 412 So. 2d 487.

No. 81–6638. RUDMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6642. WILBURN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6644. RODGERS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1326.

No. 81–6645. RITTER *v.* RITTER. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–6649. BENTLEY *v.* RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1336.

No. 81–6650. ARMENTO *v.* SCURR, WARDEN, IOWA STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 705.

No. 81–6653. SMITH *v.* INLAND STEEL CO. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 700.

No. 81–6656. MA *v.* FIRST NATIONAL CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 81–6668. KELLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1312.

No. 81–6670. MCKINSTRY *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 81–6673. OCCHINO *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 675 F. 2d 220.

No. 81–6684. VAN ORMAN *v.* FIRST NATIONAL BANK OF SOUTH CENTRAL MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1225.

No. 81–6685. WILLIAMS *v.* PEPSI-COLA BOTTLING COMPANY OF ST. LOUIS, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 704.

No. 81–6696. CARDENAS *v.* CANALE. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 183.

No. 81–6698. CROSS *v.* CITY OF TULSA. C. A. 10th Cir. Certiorari denied.

No. 81–6721. CAMOSCIO *v.* MASSACHUSETTS BOARD OF REGISTRATION IN PODIATRY ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 385 Mass. 1002, 430 N. E. 2d 1212.

No. 81–6730. QUITIQUIT *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 81–6748. JEFFERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 2d 675.

No. 81–6750. JOHNSTON *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 922.

No. 81–6757. CARRIER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 300.

No. 81–6767. BUSSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 695.

No. 81–6786. BARNEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 674 F. 2d 729.

No. 81–1988. CONSOLIDATED MOTOR INNS *v.* BVA CREDIT CORP. C. A. 11th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 666 F. 2d 189.

No. 81–2085. GUIDE PUBLISHING CO., T/A JOURNAL AND GUIDE *v.* THOMAS. Sup. Ct. Va. Motion of American Newspaper Publishers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 81–6422. GENSON *v.* RIPLEY ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 81–6570. ARANGO *v.* FLORIDA. Sup. Ct. Fla.; and
No. 81–6598. KRIER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 81–6570, 411 So. 2d 172; No. 81–6598, 249 Ga. 80, 287 S. E. 2d 531.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 81–6594. POPE *v.* THONE, GOVERNOR OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 671 F. 2d 298.

Rehearing Denied

No. 81–160. MISSISSIPPI ET AL. *v.* PHILLIPS ET AL., 456 U. S. 960;
No. 81–181. JOINT LEGISLATIVE COMMITTEE FOR PERFORMANCE, EVALUATION, AND EXPENDITURE REVIEW OF MISSISSIPPI ET AL. *v.* PHILLIPS ET AL., 456 U. S. 960; and
No. 81–6421. WESTOVER *v.* RICHENBERGER ET AL., 456 U. S. 964. Petitions for rehearing denied.

No. 27, Orig. OHIO *v.* KENTUCKY, 456 U. S. 958; and No. 81, Orig. KENTUCKY *v.* INDIANA ET AL., 456 U. S. 958. Petition of Dorothy Cole et al. for rehearing on denial of leave to intervene denied.

No. 80–1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES, 456 U. S. 107. Petition of Kenneth L. Bell for rehearing denied.

No. 81–6281. APPLEBY *v.* WTIC–FM RADIO STATION ET AL., 456 U. S. 933. Motion for leave to file petition for rehearing denied.

JUNE 22, 1982

Dismissal Under Rule 53

No. 81–1551. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ROSOFSKY. D. C. E. D. N. Y. [Probable jurisdiction noted, 456 U. S. 959.] Appeal dismissed under this Court's Rule 53.

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1. *Attachment—Creditors' conduct—Color of state law.*—In petitioner debtor's federal-court action under 42 U. S. C. § 1983 alleging that respondent creditors had acted jointly with State to deprive petitioner of his property without due process when respondents had obtained a writ of attachment of petitioner's property in their state-court action on debt, which attachment was later dismissed for respondents' failure to comply with

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state statute, petitioner presented a valid claim under § 1983 arising from respondent's actions under color of state law insofar as he challenged state statute as being procedurally unconstitutional but not insofar as he alleged only abuse by respondents of state law. Lugar v. Edmondson Oil Co., p. 922.

2. *Employment discrimination—Federal-court action—Exhaustion of state administrative remedies.*—Exhaustion of state administrative remedies is not a prerequisite to an action under 42 U. S. C. § 1983, such as petitioner's Federal District Court action wherein she alleged that respondent employer had denied her employment opportunities solely on basis of her race and sex. Patsy v. Board of Regents of Florida, p. 496.

3. *Private school—Discharge of employees—Color of state law.*—A private school for maladjusted high school students who were mostly referred to school by city or state authorities, which school received public funds for at least 90% of its operating budget and was subject to state regulations and public contracts covering various matters but imposing few specific personnel requirements, did not act under color of state law in discharging petitioner teachers and a vocational counselor, who thus could not maintain action against school under 42 U. S. C. § 1983 for alleged violation of their constitutional rights. Rendell-Baker v. Kohn, p. 830.

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1. *Employment discrimination—Class action—Proper class representative.*—In an action under Title VII of Act brought by respondent Mexican-American who was denied a promotion by petitioner employer allegedly because of promotion policy operating against Mexican-Americans as a class, District Court erred in permitting respondent to maintain a class action on behalf of both Mexican-American employees who were denied promotion and Mexican-American applicants who were denied employment, respondent's complaint not showing that he was a proper class representative under Federal Rule of Civil Procedure 23(a). General Telephone Co. of Southwest v. Falcon, p. 147.

2. *Employment discrimination—Promotions—Written tests.*—In an action under Title VII of Act by respondent black employees of a state agency—wherein it was alleged that petitioner State and state agencies and officials, had violated Act by requiring, as a condition for consideration for promotion, that applicants pass a written test that disproportionately excluded blacks and was not job related, and wherein petitioners asserted as a defense "bottom-line" result that 22.9% of eligible black candidates but only 13.5% of eligible white candidates were promoted—petitioners' nondiscriminatory "bottom line" did not preclude respondents from establishing a prima facie case or provide petitioners with a defense. Connecticut v. Teal, p. 440.

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3. *Hiring practices—Sex discrimination—Subsidiary of Japanese company.*—Petitioner, a New York corporation that is a wholly owned subsidiary of a Japanese general trading company, is not a company of Japan within meaning of provisions of Friendship, Commerce and Navigation Treaty between United States and Japan permitting companies of either country to employ, within territory of other country, technical experts, executives, agents, and other specialists of their choice, and thus petitioner was not exempted from provisions of Title VII of Act in action by past and present female secretarial employees claiming that Act was violated by petitioner's alleged practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions. Sumitomo Shoji America, Inc. v. Avagliano, p. 176.

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1. *Involuntarily committed mental patient—Protection of rights.*—Mentally retarded person, involuntarily committed to a Pennsylvania state institution, has constitutionally protected liberty interests under Due Process Clause to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably may be required by such interests; whether patient's rights were violated by institution officials must be determined by balancing patient's interests against relevant state interests, and proper standard for determining whether patient's rights were adequately protected is whether professional judgment in fact was exercised. Youngberg v. Romeo, p. 307.

2. *Medicaid benefits—Transfer of nursing-home patients.*—In an action by nursing-home Medicaid patients who alleged that their due process rights were violated when nursing home decided to transfer them to a lower level of care in another facility, resulting in administrative hearings and local and state officials' decisions to discontinue Medicaid benefits unless respondents accepted transfer, respondents failed to establish "state action" in nursing-home decisions to discharge or transfer Medicaid patients to lower levels of care and thus failed to prove any violation of rights secured by Fourteenth Amendment. Blum v. Yaretsky, p. 991.

3. *Presumption of prosecutorial vindictiveness—Indictment for felony pending trial on misdemeanor charges.*—A presumption of prosecutorial vindictiveness, so as to establish a due process violation, is not warranted where—after respondent decided not to plead guilty to federal misdemeanor charges and requested a jury trial—prosecutor, while misdemeanor charges were still pending, obtained an indictment for, and respondent was thereafter convicted of, a felony charge arising from same incident as misdemeanor charges. United States v. Goodwin, p. 368.

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VIII. Searches and Seizures.

Warrantless arrest of felony suspect—Retroactivity of decision.—A Supreme Court decision construing Fourth Amendment is to be applied retroactively to all convictions that were not yet final at time decision was rendered, except where a case would be clearly controlled by existing retroactivity precedents; under this rule, decision in *Payton* v. *New York*, 445 U. S. 573, holding that Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest, was applicable to respondent's case. United States v. Johnson, p. 537.

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FEDERAL-STATE RELATIONS. See Civil Rights Act of 1871, 2; Constitutional Law, X; Jurisdiction, 1, 2; Procedure, 1, 2; Riparian Rights; Urban Mass Transportation Act of 1964; Voting Rights Act of 1965.

FEDERAL UNEMPLOYMENT TAX ACT. See Jurisdiction, 2, 4.

FELONY ARRESTS. See Constitutional Law, VIII.

FIFTH AMENDMENT. See Confessions; Constitutional Law, II; IV, 2, 4.

FINGERPRINTS. See Confessions.

FIRST AMENDMENT. See Constitutional Law, IV, 3; V–VII; Jurisdiction, 2, 4; Labor-Management Reporting and Disclosure Act of 1959; Mootness, 1.

FORCIBLE ADMINISTRATION OF ANTIPSYCHOTIC DRUGS TO MENTAL PATIENTS. See Procedure, 2.

FOURTEENTH AMENDMENT. See Civil Rights Act of 1871, 1, 3; Constitutional Law, II; III, 1, 2; IV, 1–3; V; VII; Mootness, 1; Standing to Sue.

FOURTH AMENDMENT. See Constitutional Law, VIII.

FREEDOM OF ASSEMBLY. See Labor-Management Reporting and Disclosure Act of 1959.

FREEDOM OF ASSOCIATION. See Constitutional Law, V.

FREEDOM OF RELIGION. See Jurisdiction, 2, 4.

FREEDOM OF SPEECH. See Constitutional Law, VI; Labor-Management Reporting and Disclosure Act of 1959.

FRIENDSHIP, COMMERCE AND NAVIGATION TREATY BETWEEN UNITED STATES AND JAPAN. See Civil Rights Act of 1964, 3.

GENDER-BASED DISCRIMINATION. See Civil Rights Act of 1871, 2; Civil Rights Act of 1964, 3.

GIFT TAXES. See Internal Revenue Code.

GOVERNMENT CONTRACTS. See Procedure, 1.

GOVERNMENT OFFICERS AND EMPLOYEES. See Civil Rights Act of 1964, 2; Constitutional Law, IV, 3; Jurisdiction, 3; President and Presidential Aides.

GOVERNMENT OFFICIALS' IMMUNITY FROM SUIT. See **Jurisdiction, 3; President and Presidential Aides.**

HEALTH CARE PLANS' DISCRIMINATION AGAINST PSYCHOLOGISTS. See **Antitrust Acts, 1.**

HEALTH CARE PRICE-FIXING AGREEMENTS. See **Antitrust Acts, 2.**

HEALTH, EDUCATION, AND WELFARE DEPARTMENT. See **Constitutional Law, X.**

HIGH SCHOOL LIBRARY CENSORSHIP. See **Constitutional Law, VI.**

HIGH SCHOOL RACIAL QUOTAS. See **Procedure, 3.**

HIRING PRACTICES. See **Civil Rights Act of 1964, 1, 3.**

HOME ARRESTS. See **Constitutional Law, VIII.**

HOSPITALS. See **Constitutional Law, III, 1; Procedure, 2.**

ILLEGAL ALIEN CHILDREN'S RIGHT TO EDUCATION. See **Constitutional Law, IV, 2.**

ILLINOIS. See **Constitutional Law, I; Mootness, 2.**

IMMUNITY OF FEDERAL OFFICIALS FROM SUIT. See **Jurisdiction, 3; President and Presidential Aides.**

IMPLIED PRIVATE CAUSES OF ACTION. See **Urban Mass Transportation Act of 1964.**

INCOME TAXES. See **Internal Revenue Code.**

INDICTMENT FOR FELONY PENDING TRIAL ON MISDEMEANOR CHARGES. See **Constitutional Law, III, 3.**

INDIGENTS. See **Constitutional Law, III, 2; IV, 4; X; Standing to Sue.**

INJUNCTIONS. See **Jurisdiction, 2; Norris-La Guardia Act.**

INTEGRATION OF SCHOOLS. See **Procedure, 3.**

INTERIM APPOINTMENTS TO FILL VACANCIES IN LEGISLATURES. See **Constitutional Law, V.**

INTERNAL REVENUE CODE.

Income tax—Payment of gift tax by donee—Taxable income to donor.—A donor who makes a gift of property on condition that donee pay resulting gift taxes realizes taxable income to extent that gift taxes paid by donee

INTERNAL REVENUE CODE—Continued.
exceed donor's adjusted basis in property. Diedrich v. Commissioner, p. 191.

INTERPLEADER ACTIONS. See **Constitutional Law**, IX; **Procedure**, 4.

INTERSTATE COMMERCE. See **Constitutional Law**, I.

INVOLUNTARY DRUG TREATMENT OF MENTAL PATIENTS. See **Procedure**, 2.

JAPAN. See **Civil Rights Act of 1964**, 3.

JUNIOR HIGH SCHOOL LIBRARY CENSORSHIP. See **Constitutional Law**, VI.

JURISDICTION. See also **Admiralty**; **Procedure**, 4; **Voting Rights Act of 1965**, 1.

1. *Federal courts—Interference with state attorney-disciplinary proceedings—Abstention.*—Federal courts should abstain from interfering with ongoing attorney-disciplinary proceedings within jurisdiction of New Jersey Supreme Court, since such proceedings, commencing with filing of a complaint with a local District Ethics Committee, are considered by State Supreme Court as "judicial" in nature and afford an adequate opportunity for attorney to raise claims under Federal Constitution. Middlesex County Ethics Committee v. Garden State Bar Assn., p. 423.

2. *Federal District Court—Validity of California unemployment compensation tax—Injunctive and declaratory relief.*—Tax Injunction Act deprived Federal District Court of jurisdiction to issue declaratory as well as injunctive relief in an action by churches and religious schools to enjoin California from collecting tax information and its unemployment compensation tax with regard to plaintiffs' employees, and to enjoin Secretary of Labor from conditioning his approval, pursuant to Federal Unemployment Tax Act, of California unemployment insurance program on its coverage of plaintiffs' employees, since under California refund procedures taxpayers could challenge in state court validity of unemployment tax under Establishment Clause of First Amendment. California v. Grace Brethren Church, p. 393.

3. *Supreme Court—President's immunity from damages liability—Mootness.*—Where petitioner former President took collateral appeal to Court of Appeals from District Court's decision that he was not entitled to absolute immunity from damages liability in respondent's action for alleged wrongful discharge from Government employment, Supreme Court had jurisdiction to determine immunity question after Court of Appeals improperly dismissed appeal for lack of jurisdiction, and controversy was not mooted by parties' agreement to liquidate damages entered into after filing of petition for certiorari and respondent's opposition thereto. Nixon v. Fitzgerald, p. 731.

JURISDICTION—Continued.

4. *Supreme Court—Validity of California unemployment compensation tax—Appeal from District Court judgment.*—In an action by churches and religious schools to enjoin California from collecting tax information and its unemployment compensation tax with regard to plaintiffs' employees, and to enjoin Secretary of Labor from conditioning his approval, pursuant to Federal Unemployment Tax Act, of California unemployment insurance program on its coverage of plaintiffs' employees, wherein effect of Federal District Court's various opinions and orders was to make United States or its officers bound by a holding of unconstitutionality as to California's unemployment taxes as applied to employees of religious schools unaffiliated with churches, Supreme Court had jurisdiction to hear appeals under 28 U. S. C. § 1252, even though District Court did not expressly hold pertinent provision of Federal Unemployment Tax Act unconstitutional. California v. Grace Brethren Church, p. 393.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

Union-office elections—Campaign contributions—Validity of union rule.—A union's rule prohibiting candidates for union office from accepting campaign contributions from nonmembers and creating an enforcement committee whose decisions are final does not violate "freedom of speech and assembly" provisions of § 101(a)(2) of Act, but instead is sheltered by § 101(a)(2)'s proviso authorizing "reasonable" union rules regarding its members' responsibilities; nor does union's rule violate § 101(a)(4) of Act, which prohibits union from limiting its members' right to institute judicial or administrative actions, union's rule not being applicable to use of "outsider" funds to finance litigation. Steelworkers v. Sadlowski, p. 102.

LABOR UNIONS. See **Labor-Management Reporting and Disclosure Act of 1959; Norris-La Guardia Act; Urban Mass Transportation Act of 1964.**

LIBRARY CENSORSHIP. See **Constitutional Law,** VI.

LONGSHOREMEN UNIONS' REFUSAL TO HANDLE SOVIET UNION CARGO. See **Norris-La Guardia Act.**

LOUISVILLE, MISS. See **Voting Rights Act of 1965.**

MARITIME COLLISIONS. See **Admiralty.**

MASSACHUSETTS. See **Civil Rights Act of 1871,** 3; **Constitutional Law,** IV, 4; VII; **Mootness,** 1; **Procedure,** 2.

MEDICAID. See **Constitutional Law,** III, 2; IV, 4; **Standing to Sue.**

MEDICAL CARE PRICE-FIXING AGREEMENTS. See **Antitrust Acts,** 2.

"MEDICALLY NEEDY." See **Constitutional Law,** IV, 4.

MENTAL PATIENTS. See **Constitutional Law,** III, 1; **Procedure,** 2.

MINERAL INCOME OF STATE. See **Constitutional Law,** IV, 1.

MINORITY-OWNED BUSINESSES. See **Procedure,** 1.

MISSISSIPPI. See **Voting Rights Act of 1965.**

MOOTNESS. See also **Jurisdiction,** 3; **Procedure,** 3.

1. *Order closing trial during minor sex-offense victim's testimony—Completion of trial pending appellate review.*—Controversy arising from newspaper publisher's challenge to constitutionality of Massachusetts trial court's order excluding press and public from courtroom during testimony of minor victim at sex-offense trial is not rendered moot within meaning of Art. III by fact that exclusion order expired with completion of trial, resulting in acquittal, while controversy was pending before Massachusetts Supreme Judicial Court. Globe Newspaper Co. v. Superior Court, p. 596.

2. *Tender offers—Action challenging validity of Illinois statute—Withdrawal of tender offer.*—Where District Court granted declaratory and injunctive relief in corporation tender offeror's action challenging validity of Illinois statute which imposed restrictions as to tender offers, but corporation thereafter withdrew tender offer and decided not to make another offer, case is not moot since a state official indicated his intention to enforce statute against corporation, and thus a reversal of District Court's judgment would expose corporation to civil and criminal liability for making an offer in violation of statute. Edgar v. MITE Corp., p. 624.

NATIONAL LABOR RELATIONS ACT. See **Norris-La Guardia Act.**

NAVIGABLE WATERS. See **Admiralty.**

NEEDY PERSONS. See **Constitutional Law,** III, 2; IV, 4; X; **Standing to Sue.**

NEW JERSEY. See **Jurisdiction,** 1.

NEWS MEDIA'S RIGHT TO ATTEND CRIMINAL TRIALS. See **Constitutional Law,** VII; **Mootness,** 1.

NEW YORK. See **Constitutional Law,** III, 2; X; **Standing to Sue.**

NORRIS-La GUARDIA ACT.

Injunction—Longshoremen unions' work stoppage—Political motivation.—Act's prohibition of injunctions against strikes arising from "labor dispute" applies to action by employers to enjoin, pending arbitration, longshoremen unions' refusal to handle cargo from or destined for Soviet Union, notwithstanding work stoppage was politically motivated as a protest of Soviet Union's intervention in Afghanistan; nor may strike be enjoined pending arbitration on asserted ground that underlying dispute—

NORRIS-La GUARDIA ACT—Continued.
unions' protest against Soviet Union—was arbitrable under no-strike clause of collective-bargaining agreement. Jacksonville Bulk Terminals, Inc. v. Longshoremen, p. 702.

NURSING HOMES. See **Constitutional Law**, III, 2; **Standing to Sue.**

OCEANFRONT LAND. See **Riparian Rights.**

ORIGINAL JURISDICTION OF SUPREME COURT. See **Procedure**, 4.

PHYSICIANS' PRICE-FIXING AGREEMENTS. See **Antitrust Acts**, 2.

PLEASURE-BOAT COLLISIONS. See **Admiralty.**

POLICE INTERROGATION. See **Confessions.**

POLITICALLY MOTIVATED STRIKES. See **Norris-La Guardia Act.**

POLITICAL PARTIES. See **Constitutional Law**, V.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Constitutional Law**, X.

PRESIDENT AND PRESIDENTIAL AIDES. See also **Jurisdiction**, 3.

1. *Damages liability—Absolute immunity.*—President is entitled to absolute immunity from damages liability predicated on his official acts, and thus respondent could not recover damages from petitioner for alleged illegal discharge of respondent from Government employment. Nixon v. Fitzgerald, p. 731.

2. *Damages liability—Qualified immunity.*—Presidential aides—like executive officials in general—are not entitled to absolute immunity from damages liability predicated on performance of their duties, but are generally entitled only to qualified immunity; to establish entitlement to absolute immunity, a Presidential aide must show that responsibilities of his office embraced a function so sensitive as to require absolute immunity and that he was discharging protected function when performing act for which liability is asserted. Harlow v. Fitzgerald, p. 800.

PRESS' RIGHT TO ATTEND CRIMINAL TRIALS. See **Constitutional Law**, VII; **Mootness**, 1.

PRESUMPTION OF PROSECUTORIAL VINDICTIVENESS. See **Constitutional Law**, III, 3.

PRICE-FIXING AGREEMENTS AS TO MEDICAL CARE. See **Antitrust Acts**, 2.

PRIMARY ELECTIONS. See **Constitutional Law**, V.

PRIVATE SCHOOLS. See **Civil Rights Act of 1871, 3.**

PROCEDURE.

1. *Constitutionality of affirmative-action plan—Determination of pendent state-law claim.*—In affirming Federal District Court's judgment upholding constitutionality of respondent School District's affirmative-action plan, which required that general contractors, to be eligible for certain School District contracts, must use minority-owned businesses for at least 25% of total bid, Court of Appeals abused its discretion in deciding federal constitutional claim instead of first resolving pendent state-law claim that plan violated California law. Schmidt v. Oakland Unified School Dist., p. 594.

2. *Mental patients' constitutional rights—Federal Court of Appeals' judgment—Remand for consideration of intervening state-court decision.*—In an action involving alleged violation of federal constitutional rights of involuntarily committed mental patients, institutionalized at a Massachusetts state hospital, by forcible administration of antipsychotic drugs, Federal Court of Appeals' judgment—holding that patients had constitutionally protected interests and remanding to District Court for consideration of appropriate procedural mechanisms for determining when State's interests might override patient's interests—was vacated and case was remanded for consideration of whether case's disposition was affected by Massachusetts Supreme Judicial Court's intervening decision as to rights under both Massachusetts law and Federal Constitution of a *noninstitutionalized* incompetent mental patient as to involuntary treatment with antipsychotic drugs. Mills v. Rogers, p. 291.

3. *Racial quota plan for high schools—Consolidation of related cases.*—In an action challenging constitutionality of respondent Board of Education's racial quota plan for high schools—wherein Court of Appeals' judgment upholding plan was vacated and this Court remanded for further consideration in light of a subsequent decree in a related case, and wherein, on remand from Court of Appeals, District Court held that challenge to plan was not rendered moot by such decree and Court of Appeals affirmed—this Court held that although case was not moot and decree in related case did not undermine Court of Appeals' original judgment, Court of Appeals' second judgment should be vacated with direction to consolidate matter with related case so that District Court could decide constitutional challenge to plan on basis of a complete factual record. Johnson v. Chicago Board of Education, p. 52.

4. *Supreme Court—Original jurisdiction—Dispute between States—Imposition of death taxes.*—California's motion for leave to file a bill of complaint seeking determination of whether decedent involved was domiciled in California or Texas at time of his death was granted, since bill stated a controversy between two States concerning which State could impose

PROCEDURE—Continued.

death taxes, and since precondition of nonavailability of another forum, necessary for this Court's exercise of original jurisdiction, was met. California v. Texas, p. 164.

PROMOTION PRACTICES OF EMPLOYERS. See **Civil Rights Act of 1964**, 1, 2.

PROSECUTORIAL VINDICTIVENESS. See **Constitutional Law**, III, 3.

PSYCHIATRISTS AND PSYCHOLOGISTS. See **Antitrust Acts**, 1.

PUBLIC CONTRACTS. See **Procedure**, 1.

PUBLIC EDUCATION OF ILLEGAL ALIEN CHILDREN. See **Constitutional Law**, IV, 2.

PUBLIC OFFICERS AND EMPLOYEES. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, IV, 3; **Jurisdiction**, 3; **President and Presidential Aides.**

PUBLIC'S RIGHT TO ATTEND CRIMINAL TRIALS. See **Constitutional Law**, VII; **Mootness**, 1.

PUERTO RICO. See **Constitutional Law**, V.

QUALIFIED IMMUNITY OF FEDERAL OFFICIALS FROM SUIT. See **President and Presidential Aides**, 2.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1871**, 2; **Civil Rights Act of 1964**, 1, 2; **Procedure**, 1, 3.

RACIAL QUOTAS FOR SCHOOLS. See **Procedure**, 3.

RELIGIOUS SCHOOLS. See **Jurisdiction**, 2, 4.

REMAND FOR CONSIDERATION OF INTERVENING DECISION. See **Procedure**, 2.

REMAND FOR CONSOLIDATION WITH RELATED CASE. See **Procedure**, 3.

RESIDENCY REQUIREMENTS. See **Constitutional Law**, IV, 1.

RESIDENTIAL ARRESTS. See **Constitutional Law**, VIII.

RESIGNATION FROM PUBLIC OFFICE. See **Constitutional Law**, IV, 3.

RETRIAL AFTER REVERSAL OF CONVICTION. See **Constitutional Law**, II.

RETROACTIVITY OF DECISIONS. See **Constitutional Law**, VIII.

RIGHT OF ACCESS TO CRIMINAL TRIALS. See **Constitutional Law**, VII; **Mootness**, 1.

RIGHT OF ASSOCIATION. See **Constitutional Law**, V.

RIPARIAN RIGHTS.

Oceanfront land—Accretion.—Under federal law, United States, not California, has title to oceanfront land created through accretion, resulting from jetty construction, to land owned by United States on California's coast. California ex rel. State Lands Comm'n v. United States, p. 273.

SCHOOL DISTRICT CONTRACTS. See **Procedure**, 1.

SCHOOL DISTRICT ELECTIONS. See **Voting Rights Act of 1965.**

SCHOOLS. See **Civil Rights Act of 1871**, 3; **Constitutional Law**, IV, 2; VI; **Procedure**, 3.

SEARCHES AND SEIZURES. See **Constitutional Law**, VIII.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE. See **Constitutional Law**, X.

SECURITIES REGULATION. See **Constitutional Law**, I; **Mootness**, 2.

SEPARATION OF POWERS. See **President and Presidential Aides.**

SEX DISCRIMINATION. See **Civil Rights Act of 1871**, 2; **Civil Rights Act of 1964**, 3.

SEX-OFFENSE TRIALS. See **Constitutional Law**, VII; **Mootness**, 1.

SHERMAN ACT. See **Antitrust Acts.**

SOCIAL SECURITY ACT. See **Constitutional Law**, III, 2; IV, 4; X; **Standing to Sue.**

STANDING TO SUE. See also **Antitrust Acts**, 1.

Medicaid benefits—Transfer of nursing-home patients—Due process rights.—In an action by respondent nursing-home Medicaid patients who alleged violation of due process rights when nursing home decided that they should be transferred to a lower level of care in another facility, resulting in administrative hearings and local and state officials' decisions to discontinue Medicaid benefits unless respondents accepted transfer, respondents have standing to challenge procedural adequacy of facility-initiated discharges and transfers to lower levels of care, but do not have standing to seek adjudication as to procedures for transfers to higher levels of care. Blum v. Yaretsky, p. 991.

STATE ACTION. See **Civil Rights Act of 1871**, 1, 3; **Constitutional Law**, III, 2.

STATE-COURT DETERMINATION OF APPLICABILITY OF VOTING RIGHTS ACT OF 1965. See **Voting Rights Act of 1965.**

STATE ESTATE TAXES. See **Constitutional Law**, IX; **Procedure**, 4.

STATE LEGISLATORS. See **Constitutional Law**, IV, 3.

STATE'S RIGHT TO OCEANFRONT ACCRETIONS. See **Riparian Rights.**

STATE UNEMPLOYMENT COMPENSATION TAXES. See **Jurisdiction**, 2, 4.

STRIKES. See **Norris-La Guardia Act.**

SUBMERGED LANDS ACT. See **Riparian Rights.**

SUPREMACY CLAUSE. See **Constitutional Law**, X.

SUPREME COURT. See also **Jurisdiction**, 3, 4; **Procedure**, 4; **Voting Rights Act of 1965**, 1.

1. Assignment of Justice Stewart (retired) to the United States Court of Appeals for the Second Circuit, p. 1112.

2. Appointment of Christopher W. Vasil as Deputy Clerk, p. 1101.

TAKEOVER BIDS. See **Constitutional Law**, I; **Mootness**, 2.

TAXES. See **Constitutional Law**, IX; **Internal Revenue Code**; **Jurisdiction**, 2, 4.

TAX INJUNCTION ACT. See **Jurisdiction**, 2.

TEACHERS. See **Civil Rights Act of 1871**, 3.

TENDER OFFERS. See **Constitutional Law**, I; **Mootness**, 2.

TEXAS. See **Constitutional Law**, IV, 2, 3; IX; **Procedure**, 4.

TRAINING OF MENTAL PATIENTS. See **Constitutional Law**, III, 1.

TRANSFER OF NURSING-HOME MEDICAID PATIENTS. See **Constitutional Law**, III, 2; **Standing to Sue.**

TRANSIT AUTHORITIES. See **Urban Mass Transportation Act of 1964.**

TREATIES. See **Civil Rights Act of 1964**, 3.

TRUSTEES OF SCHOOL DISTRICTS. See **Voting Rights Act of 1965.**

UNEMPLOYMENT COMPENSATION TAXES. See **Jurisdiction**, 2, 4.

UNION OFFICERS. See **Labor-Management Reporting and Disclosure Act of 1959.**

UNIONS. See **Labor-Management Reporting and Disclosure Act of 1959**; **Norris-La Guardia Act**; **Urban Mass Transportation Act of 1964.**

UNITED STATES' RIGHT TO OCEANFRONT ACCRETIONS. See **Riparian Rights.**

UPLAND OWNER'S RIGHT TO ACCRETIONS. See **Riparian Rights.**

URBAN MASS TRANSPORTATION ACT OF 1964.

State or local government's acquisition of transit company—Breach of agreement with union—Implied causes of action.—Section 13(c) of Act, which requires a state or local government to make arrangements to preserve transit workers' existing collective-bargaining rights before such government may receive federal financial assistance for acquisition of a privately owned transit company, does not provide implied federal private causes of action to a transit union for alleged breaches by city and its transit authority of "§ 13(c) agreement" with union and of collective-bargaining agreement—Congress having intended that such agreements be governed by state law applied in state courts. Jackson Transit Authority v. Transit Union, p. 15.

VACANCIES IN LEGISLATURES. See **Constitutional Law,** V.

VESSEL COLLISIONS. See **Admiralty.**

VIRGINIA. See **Civil Rights Act of 1871,** 1.

VOTING RIGHTS ACT OF 1965.

1. *Change in state voting law—Federal preclearance requirements—Review of state-court decision.*—In an action involving validity and enforcement of a state statute governing elections of school district trustees, wherein Mississippi Supreme Court, after first upholding statute against challenge on state constitutional grounds, held that lower court, on remand, had improperly conditioned election on compliance with federal preclearance requirements of § 5 of Voting Rights Act, decision did not rest on independent and adequate state grounds so as to bar this Court's review of federal issue. Hathorn v. Lovorn, p. 255.

2. *Change in state voting law—Federal preclearance requirements—State court's power.*—In a state-court action by county voters seeking to require officials of Winston County, Miss., to enforce a 1964 state statute governing elections of school district trustees, Mississippi courts had power to decide whether federal preclearance requirements of § 5 of Voting Rights Act were applicable, and must withhold implementation of disputed change until parties demonstrated compliance with § 5. Hathorn v. Lovorn, p. 255.

WARRANTLESS ARRESTS. See **Constitutional Law,** VIII.

WATERS. See **Admiralty; Riparian Rights.**

WEIGHT OF EVIDENCE IN CRIMINAL CASE. See **Constitutional Law,** II.

WELFARE BENEFITS. See **Constitutional Law**, III, 2; IV, 4; X; **Standing to Sue.**

WINSTON COUNTY, MISS. See **Voting Rights Act of 1965.**

WORDS AND PHRASES.

1. *"Enjoin, suspend or restrain."* Tax Injunction Act, 28 U. S. C. § 1341. California v. Grace Brethren Church, p. 393.

2. *"Labor dispute."* § 4, Norris-La Guardia Act, 29 U. S. C. § 104. Jacksonville Bulk Terminals, Inc. v. Longshoremen, p. 702.

3. *"Plain, speedy and efficient remedy."* Tax Injunction Act, 28 U. S. C. § 1341. California v. Grace Brethren Church, p. 393.